United States Court of Appeals

for the Second Circuit

APPENDIX

76 6117

JOINT APPENDIX, Volume II

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6117

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellees,

v.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellees.

and

F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education and Welfare,

Defendant.

APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
JAN 18 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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7/26/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

----------X

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York and DAVID MATHEWS as Secretary of the U.S. Dept. of Health, Education and Welfare,

Defendants.

----------X

ANSWER TO AMENDED COMPLAINT

76 Civ. 2027
JUDGE LASKER

The defendants Toia, Whalen, Goldmark and Carey (hereafter referred to as the State defendants) answering the amended complaint herein by their attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, respectivelly:

1. Admit the allegations of paragraphs 16, 21, 22, 24, 25, 26, 27, 28, 35, 37, 58, 59 and 61 of the Amended Complaint.

2. Deny the allegations of paragraphs 18, 30, 34, 36, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 68, 69 and 70 of the Amended Complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 7, 8, 9, 10, 11 and 62 of the Amended Complaint.

BEST COPY AVAILABLE

4. Admit the allegations of paragraphs 12, 13, 14 and 15 of the Amended Complaint except that they deny the defendants named in said paragraphs are acting contrary to the Constitution and laws of the State of New York or of the United States.

5. Admit the allegations of paragraph 22 of the Amended Complaint except they deny that prior approval of the Secretary is required as alleged in said paragraph.

6. Admit the allegations of paragraph 28 except the last sentence thereof which they deny.

7. Deny the allegations of paragraph 31 except the first sentence thereof.

8. Admit the allegations of paragraph 32 except they deny the allegations of the last two sentences thereof.

9. Admit the allegations of paragraph 33 but deny that the recovery will threaten the financial viability of the hospitals and their ability to provide quality health care.

10. Admit the allegations of paragraph 38 but allege that Regulation 10 NYCRR 86.26 was promulgated as an emergency measure under the provision of New York's Executive Law § 110-a(3)

11. Admit the allegations of paragraph 40 but deny the members of the class will be reimbursed at less than reasonable costs.

12. Deny the allegations of paragraph 41 except the first sentence thereof which they admit.

13. Admit the allegations of paragraph 60 of the Amended Complaint but deny knowledge or information sufficient to form a belief as to the allegations of said paragraph that the cost of delivery of out-patient services to Medicaid patients is greater in 1976 than in 1975.

14. Admit the allegations of paragraph 64 except the last sentence thereof which they deny.

AS AND FOR A FIRST SEPARATE AND AFFIRMATIVE DEFENSE, THE STATE DEFENDANTS ALLEGE:

15. Public Law No. 94-182, § 111, 89 Stat. 1054, referred to in paragraph 59 of the Amended Complaint which requi the States to consent to suit in Federal Court by providers of in patient hospital services and to waive the immunity from such suit under Amendment XI to the Constitution of the United States is unconstitutional and beyond the power of the Congress to enact The State of New York executed its consent under protest and by reason of the fact that failure to execute the consent would have cost the State upwards of $40,000,000 in Federal Funds. The State executed the consent but expressly reserved the questio of the propriety of the demand for this waiver. See letter date March 31, 1976 from defendant Toia to Commissioner Toby of the Department of Health, Education and Welfare attached hereto as Exhibit "A".

The State defendants assert that this Court has no jurisdiction under said Public Law 94-132, nor under any other of the statutes cited in paragraphs 17 and 18 of the Amended Complaint.

Said Public Law No. 94-182, § 111 is violative of the XI Amendment to the Constitution and of the equal protection of the laws provided for in the XIV Amendment to said Constitution.

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, THE STATE DEFENDANTS ALLEGE:

16. This action against the State defendants is an action against them as officials of the State of New York. The

State has not by constitutional provision or statutory enactment--consented to suit in the Federal Courts nor to a waiver of its sovereign immunity from suit in Federal Court. This Court is without jurisdiction.

AS A THIRD, SEPARATE DEFENSE, THE STATE DEFENDANTS ALLEGE:

17. By Chapter 76 of the Laws of New York of 1975, the Medicaid rate of payments to hospitals for out-patient services was set at 100% of the level of payment made in 1975. Chapter 76, § 11(2)(c). Said Chapter 76 is constitutional and not violative of the Social Security Act of Federal Regulations issued thereunder. Count II of the Amended Complaint and the prayer for injunctive relief set forth in the Amended Complaint would necessarily restrain and enjoin the operation of this statute by the State defendants. Such restraint may only be ordered by a district court of three judges. 28 U.S.C. § 2281, 2284.

The State defendants respectfully request that a three-judge district court be convened to adjudicate the issue.

WHEREFORE, the said State defendants ask judgment dismissing the Amended Complaint.

Dated: New York, New York
July 26, 1976.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3391
By:

JESSE J. FIRE
Assistant Attorney General

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

1450 WESTERN AVENUE
ALBANY, NEW YORK 12243

PHILIP L. TOIA
EXECUTIVE DEPUTY
COMMISSIONER

March 31, 1976

Dear Bill:

Enclosed is the State Plan Amendment demanded by you under penalty of fiscal sanctions in your Action Transmittal, SRS-AT-76-14(HSA) dated January 28, 1976. This submission is designed to facially comply with the requirements of Section 111, P.L. 94-182, December 31, 1975.

Please be advised, however, that there are serious questions being raised by this and other states as to the constitutionality of the requirements imposed by this statute. Accordingly, this submission should not be interpreted as an acquiescence by us of the legal appropriateness of this demand. Indeed, we expect such questions to be resolved in an appropriate legal forum in the near future.

Sincerely,

Philip L. Toia

Honorable William T[illegible]
Acting Regional Commissioner
Social & Rehabilitation Service
Region II
Department of HEW
Federal Building
26 Federal Plaza
New York, New York 10007

EXHIBIT A-P. 1

☆ U.S. GOVERNMENT PRINTING OFFICE — 1974—663—215

RTMENT OF HEALTH, EDUCATION, AND WELFARE
L AND REHABILITATION SERVICE
gton, D. C. 20201

Submit 6 Copies

1976

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

REGIONAL COMMISSIONER
SOCIAL AND REHABILITATION SERVICE
DEPARTMENT OF HEALTH, EDUCATION, & WELFARE
REGION NY

TRANSMITTAL NUMBER: 76-8

STATE: New York

PROGRAM IDENTIFICATION: XIX

OF PLAN MATERIAL (CHECK ONE)

NEW STATE PLAN
AMENDMENT TO BE CONSIDERED AS NEW PLAN
AMENDMENT

PROPOSED EFFECTIVE DATE: January 1, 1976

LETE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

RAL REGULATION CITATION: P.L. 94-182, Section 111

ER OF THE PLAN SECTION OR ATTACHMENT: Revised page 24a-Title XIX Plan as required by SRS-AT-76-14

NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT: Page 24a

ECT OF AMENDMENT: State Consent to Suit

NOR'S REVIEW (CHECK ONE)

GOVERNOR'S OFFICE REPORTED NO COMMENT
☒ OTHER, AS SPECIFIED:
COMMENTS ERNOR'S OFFICE ENCLOSED
NO REPLY RE ED WITHIN 45 DAYS OF SUBMITTAL

ATURE OF STATE AGENCY OFFICIAL

D: Stephen Berger

E: Commissioner

March 30, 1976

N TO:
NYS Department of Social Services
1450 Western Avenue
Albany, New York 12243

FOR REGIONAL OFFICE USE ONLY

DATE RECEIVED: 1 APR 1976

DATE APPROVED: 7 MAY 1976

PLAN APPROVED - ONE COPY ATTACHED

EFFECTIVE DATE OF APPROVED MATERIAL

SIGNATURE OF REGIONAL OFFICIAL

TYPED NAME: William Toby

TITLE: Acting Regional Commissioner

REMARKS

BEST COPY AVAILABLE

Revision: SRS-AT-76-14(NSA) - 24a -
January 28, 1976

State NEW YORK

Citation		
45 CFR 250.70 F.R. 40-36	4.27	Disclosure of Information on Providers of Health Care Services and Contractors.

The State agency has established procedures for disclosure of information on providers of services, contractors, carriers, intermediaries and State agencies. These procedures meet all requirements of 45 CFR 250.70.

P.L. 94-182 Sec. 111	4.28	State Consent to Suit

The State hereby consents to allow suit in Federal court by or on behalf of providers of inpatient hospital services with respect to payment of reasonable costs of such services, furnished for any period after June 30, 1975, pursuant to section 1902(a)(13)(D) of the Act. The State waives any immunity from such a suit under the eleventh amendment to the Constitution or otherwise.

EXHIBIT A
p 3

Poughkeepsie, New York
by Le Heney Mendelsohn

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

..... being duly sworn, deposes and says that he is ..... in the office of the Attorney General of the State of New York, the Attorney for ..... herein. On the ..... day of ....., 19 he served the annexed upon the following named persons:

Description

Attorney in the within entitled ..... by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at TWO WORLD TRADE CENTER NEW YORK, N.Y. 10047 directed to said Attorney at the address within the State designated by ..... for that purpose.

Sworn to before me this
..... day of ....., 19

.....
Assistant Attorney General of
the State of New York

.....

...ase take notice that the within is a true
...
...duly entered here in the office of
...k of
...Y.,
Yours, etc.,
LOUIS J. LEFKOWITZ,
Attorney General,
...ney For
...ce And Post Office Address
...Capitol, Albany, N.Y. 12224
New York Office
...TRADE CENTER, NEW YORK, N.Y. 10047
.....Esq.
...ey for

...e take notice that the within
...presented for settlement and signature
...the Hon.
...Judges of the within named Court, at
...
...rk of
...York, on the day of
19 ..., at M.
...Y.,
Yours, etc.
LOUIS J. LEFKOWITZ,
Attorney General,
...y For
...e And Post Office Address
...itol, Albany, N.Y. 12224
New York Office
...E CENTER, NEW YORK, N.Y. 10047
.....Esq.
...ey for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

...OF CAPITAL ASSOCIATION OF NYS
...LIC., et al.,

Plaintiffs,

- against -

...PHILIP L. TOIA, et al.,

Defendants.

ANSWER TO AMENDED COMPLAINT

LOUIS J. LEFKOWITZ,
Attorney General
Attorney for Defendants Toia,.....
Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047
Tel.

Personal service of a copy of
within .....
is admitted this ..... day of
.....19
.....

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, et al.,

Defendants.

76 Civ. 2027

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

James C. Ingram, being duly sworn, deposes and says:

1. I submit this affidavit in further support of plaintiffs' motion for a preliminary injunction herein and in response to the affidavit of Assistant Health Commissioner William F. McCann.

2. Defendants claim that 10 NYCRR §§86.14(b), 86.21(X) and 86.26 do not change the methodology in the approved State Plan and therefore can be implemented without the prior approval of the Secretary (McCann affidavit ¶46). The Medicaid Act and regulations and the affidavit of Seymour Budoff submitted on behalf of defendant Mathews demonstrate the opposite.

> "The federal regulations also provide that state Medicaid plans which provide for payment of the reasonable cost of inpatient hospital services must be approved in advance of implementation by the Regional Commissioner of the Social and Rehabilitation Service. 45 C.F.R. Section 250.30(a)(2). None of the plan amendments, portions of which are challenged by plaintiffs herein, has received such approval." (Budoff affidavit ¶8).

3. Assistant Health Commissioner McCann was in the Courtroom at the July 20, 1976 hearing in this matter when I testified to the conversation which I had with him and Donald Davidoff, Associate Director, New York State

Health Department, Division of Health Care Cost Control, on June 22, 1976 at the Holiday Inn in Newburgh. In McCann's presence, Mr. Davidoff stated that the purpose of the challenged regulations was to reduce State Medicaid payments to hospitals. Further, he strongly implied that the calculation of Medicaid rates was being controlled by the amount of money which had been made available by the defendant Budget Director and not by any desire to reimburse hospitals their reasonable costs. (transcript pp. ¶36A-39). It is significant that nothing in McCann's affidavit contradicts my testimony.

4. Defendants attempt to justify their illegal conduct on the grounds that in-patient hospital costs in New York rose between 1970 and 1974. (McCann affidavit ¶2). Apart from the fact that it is impossible to verify defendants' figures since their source is not given, they contain no information comparing the increase in New York hospital costs in these years either with increases in the general economy or increases in the hospital costs of other states. Moreover, they do not indicate how much of this increase is attributable to inflation, over which hospitals have no control. A study conducted by Professor William L. Dowling for the Department of Health, Education and Welfare entitled "Evaluation of Blue Cross and Medicaid Prospective Reimbursement Systems in Downstate New York" (Draft - June 1976) found, that on the basis of average per diem costs, the increase in non-profit hospital costs between 1970 and 1974 was less for downstate New York hospitals than

for hospitals in Chicago, Cleveland and Philadelphia. Dowling concluded that, after eliminating the effects of inflation and out-patient workloads, the New York hospitals' inpatient costs rose 7.4% from 1970-1974 as compared to 22.0% for the other metropolitan area hospitals. Dowling Report I-22-23. This represents an average increase of approximately 1.9% per year in the costs of the downstate New York hospitals which in my opinion is primarily attributable to new programs and facilities approved by the Commissioner of Health as well as the introduction of new scientific techniques. The average annual increase for the other metropolitan area hospitals in the Dowling study was almost three times as great - namely 5.5% per year. The report further found that under prospective reimbursement

> "both adjusted cost per day and adjusted cost per case increase rates slowed substantially under PR [Prospective Reimbursement]. Adjusted cost per day increases in DNY [Downstate New York] non-profit hospitals dropped to one-quarter of their pre-PR rate (a rate equal to one-third of the 1970-1974 control hospital [Chicago, Cleveland, Philadelphia] rate). Adjusted cost per case increases in D non-profit hospitals dropped to one-third of their pre-PR rate (a rate equal to two-thirds of the 1970-1974 control hospital rate). Findings of for-profit, teaching, and non-teaching hospitals are similar."
> Dowling Report I-24 (Emphasis in original)

A copy of this report is annexed hereto as Exhibit A.

5. The fact that hospital costs may increase from year to year does not mean that these increases are unreasonable. Defendants themselves have acknowledged that reasonable hospital costs have increased between 1975 and 1976 by calculating projection factors for costs ("trend factors") which show an inflationary increase in the New York hospital economy for this period of time. For the voluntary and public hospitals the calculation sheets of the Department of Health indicate that these trend factors are as follows:

HOSPITAL GROUP	1975-1976 TREND FACTOR
Teaching, New York City	8.65
Teaching, New York Suburban	7.72
Teaching, Upstate	7.65
Voluntary, Non-Teaching NYC	8.41
Voluntary, Non-Teaching, NY Suburban 75000 Patient Days & Under	7.82
Voluntary, Non-Teaching, NY Suburban over 75000 Patient Days	8.25
Voluntary, Non-Teaching, Upstate SMSA 50000 Patient Days and under	7.49
Voluntary, Non-Teaching, Upstate SMSA over 50000 Patient Days	7.60
Voluntary, Non-Teaching, Upstate Rural 30000 Patient Days	7.63
Voluntary, Non-Teaching, Upstate Rural over 30000 Patient Days	7.14
New York City, Municipals	6.72
Psychiatric	8.34

In light of these figures, it is impossible to understand how reducing 1976 hospital reimbursement rates below 1975 levels can result in reasonable cost reimbursement.

6. Moreover, despite their repeated claims that the ceilings on cost imposed by the challenged regulations comply with the requirement of reasonable cost reimbursement, defendants have never attempted to show that a single item of cost of a single hospital has been incurred in an unreasonable manner.

7. Defendants reliance (McCann aff. ¶27) on HEW's reimbursement regulations for skilled nursing and intermediate care facility services and their claim that the Secretary has defined "reasonable cost" to mean "reasonable

cost-related" is misleading. The Medicaid Act requires that skilled nursing and intermediate care facility services be reimbursed on a "reasonable cost-related basis" and not on a "reasonable cost" basis as is required for in-patient hospital services. The preamble to these regulations makes this distinction apparent.

> "The statute requires payment for long-term facility services provided under the plan 'on a reasonable cost-related basis,' rather than simply requiring payment of 'reasonable costs,' as in section 1902(a)(13)(D) (payment for inpatient hospital services) and section 1861(v) in title XVIII (Medicare)."
> 41 F.R. 27302, col. 3 (July 1, 1976)
> Attachment 2 to McCann affidavit.

The preamble goes on to make clear that payment under the "reasonable cost-related" standard can be lower than under the "reasonable cost" standard. However, even in the case of this lower payment level, a state's financial resources cannot determine the level of reimbursement.

> "[A] State would not satisfy the requirement of section 1902(a)(13)(E) if it paid, or gave assurance to pay, the amount determined under this section to the extent that State funds are available, or to the extent that State appropriations permit. To allow a State to limit its obligation under the statute by such a provision, as some comments suggested, would permit a State to defeat a major part of Congress' purpose in enacting...[section 1902(a)(13)(E)].
> 41 F.R. 27303, Col. 1 (July 1, 1976) - Attachment 2 to McCann affidavit.

8. It is true that the Secretary recognized that there can be a variety of cost-finding methods which meet the "reasonable cost" standard. However a cost-finding

method cannot impose arbitrary limits.

> Some States are now considering imposing arbitrary limits on the increase in hospital costs which will be recognized in the reimbursement rate. Such simple limitations on cost do not meet the requirements for reimbursement of reasonable cost specified in §250.30(a)(2)(ii).
>
> (Emphasis supplied)

FIELD STAFF Information and Instruction Series: FY-76-62 State Plan Changes, January 2, 1976, issued by Department of Health, Education and Welfare, Social and Rehabilitation Service, p.9

A copy of this memorandum is annexed hereto as Exhibit B.

9. Defendants claim that only 9.6 percent of the New York voluntary hospitals had cost reductions greater than 2 percent as a result of the ceilings in the challenged regulations. (McCann affidavit ¶29). This is a completely misleading number. McCann's affidavit makes it clear that this 9.6 percent was calculated only on the basis of hospitals whose 1976 rates were lower than their 1975 rates. In addition to those hospitals whose 1976 rates were reduced below 1975 levels, there are a great many hospitals with higher 1976 rates who were also denied reasonable cost reimbursement as a result of 10 NYCRR §86.14(b) and 86.26. In total, I believe that at least 160 of the voluntary hospitals were affected by 10 NYCRR §86.14(b) and 103 were affected by 10 NYCRR §86.26.

10. Defendants attempt to justify the use of an average ceiling on routine and ancillary service costs on the ground that their hospital groupings take the differences in hospital operation into account. For purposes of ceiling calculations, defendants group hospitals solely on the basis of the following criteria; type (teaching or non-teaching hospitals); geographic area for non-teaching hospitals; size; and sponsor (voluntary, public or proprietary). Defendants' own regulations show that these are the only

criteria used. 10 NYCRR §86.13 - Approved State Plan Attachment 4.19-A. - Plaintiffs' Exhibit 1. Defendants grouping obviously does include a great many factors, such as patient mix, age, and plant design, which will create natural differences in hospital cost.

11. Defendants suggest that elimination of costs of schools of nursing, interns and residents, and capital costs from ceiling computations as well as their plan to adopt an appeal mechanism for 10 NYCRR §86.14(b) overcomes the argument that the average ceilings do not allow for the natural differences between efficiently run hospitals. (McCann affidavit ¶39). As I have explained, there are many factors other than those enumerated, which produce differences in hospitals. More than 61% of the non-profit hospitals in the State for whom rates have been calculated have been adversely affected by 10 NYCRR §86.14(b). An argument that the regulations authorize appeals is hardly an answer to our claim since a regulation whose application requires more than 61% of these hospitals to file an appeal can only be arbitrary in its operation.

12. In any event, even if hospital groupings reflected many more factors than they do, the 100% ceilings would still not be an accurate measure of reasonable cost. This is a result of the fact that if a mathematical average is used as a ceiling there must be some hospitals which exceed the average while others will be below it.

13. Defendants claim that the Medicare ceilings are ineffective (McCann affidavit ¶34), but they have not offered any evidence in support of this conclusion. These ceilings serve the function they were intended for - they protect the public against aberrantly high costs.

14. Defendants claim that hospital cost data showed the need for the use of the average ceilings. (McCann affidavit ¶35, 36). However they have not made any such cost data available. Moreover, this conclusion is contradicted by the findings of the Dowling Report referred to in ¶4 above which also concludes that

> "Blue Cross and Medicaid...prospective rates have not covered the portion of inpatient costs attributable to their patients. Blue Cross and Medicaid prospective rates consistently understated their own definitions of cost as well as the average cost for all patients. Dowling Report I-39 (Emphasis in original).

15. Defendants attempt to justify the average ancillary service cost ceiling on the ground that Blue Cross and Blue Shield of Greater New York has an ancillary service cost ceiling (McCann affidavit ¶37). However, the Blue Cross ceiling is equal to 115% of the group average of routine and ancillary service costs, and is calculated on a per patient day basis rather than a per discharge basis. A per discharge ceiling can only be valid if the service costs being compared are the same. For example, if the delivery costs of 1 hospital were compared with another this could be done on a per discharge basis. But if delivery costs are combined with surgical costs, radiological costs and physical therapy costs a per discharge comparison just won't work.

16. Defendants have not offered anything to show that the costs of interns and residents are not solely attributable to the services they perform. The fact that these doctors may be learning at the same time as they treat patients does not mean their services are not related to

hospital care. Moreover, since interns and residents work an average of 60 to 100 hours a week, they are obviously providing full time hospital service.

/s/ JAMES C. INGRAM
JAMES C. INGRAM

Sworn to before me
this 28th day of July, 1976.

/s/ Susan Rosenfeld
Notary Public

SUSAN ROSENFELD
Notary Public, State of New York
No. 31 8656000
Qualified in New York County
Commission Expires March 30 1978

Judge Lasker

HOSPITAL ASSOCIATION OF NEW YORK STATE, et al.,

v. 70 Civ. 2027

PHILLIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.

New York, New York
July 28, 1976 - 11 a.m.

- - -

THE COURT: As I have explained to counsel in the robing room, there are two points I would like to cover this morning.

One is to hear from Commissioner McCann, who is not present because he is driving down from Albany, to fill in or to answer certain questions that arise in my mind as a result of this very interesting and stimulating affidavit.

I know that there are questions to be asked of the witness.

The other thing is to clear up confusion which arises out of different or what appear to be different points of view on the part of the federal defendants and the state defendants as to precisely what the degree of approval is required by the federal government before the state government is free to implement its new regulations.

It seems to me at least that material contained in Mr. Fine's memorandum of law in opposition to application for the preliminary injunction is inconsistent with material

contained in the affidavit of Seymour Budoff, the Associate Regional Commissioner for Medical Services of the Social and Rehabilitation Services of the Department of HEW, Region 2, in New York.

If counsel are able to reconcile those difference by their discussion, fine. If not, I would like to hear testimony, if necessary or at the very least, argument.

Mr. Fine, perhaps it would be most effective if you would explain to us what your views are as to the inter-relationships between state action and federal approval here and then let Mr. O'Connor and Mr. Imberman have their say.

MR. FINE: The implication in Mr. Budoff's affidavit that the state has been negligent in seeking HEW approval, I requested the Department of Health, Education and Welfare to bring to court the original and copies of certain correspondence, one, a letter from the State Department of Social Services dated July 14, 1976; they have the original in court, but I am sure Mr. Imberman and Mr. O'Conno would not object if I submit these copies.

THE COURT: Of course not.

MR. FINE: And a copy of the incoming letter from Mr. Budoff to the Department of Social Services dated July 10th and I ask that they be marked in evidence.

THE COURT: All right. Bring them up, please.

I take it there is no objection.

MR. O'CONNOR: We have no objection, your Honor.

(State Exhibit B was received in evidence.)

MR. FINE: If you look at the index for the minute I want to discuss that with you, your Honor.

The minutes -- by the way, the exhibits are right here on the table now.

I should also like to introduce and I thought I had --

THE COURT: What confusion is there about exhibit numbers? Let's get it straightened out if there is a problem.

MR. FINE: There seems to be listed as exhibit -- there is no confusion, except that I thought that I put into evidence -- if you don't mind, I will approach the bench --

THE COURT: Please do. It is hard to hear in here.

MR. FINE: -- a letter or two letters, really, written by Donald McCord, counsel for the defendant, whom I expect will be here with Mr. McCann, transmitting to the Speaker of the House and the Majority Leader of the Senate, regulation number 8626, which --

THE COURT: Those were attached to your brief.

MR. FINE: Right. I think it would be appropria to introduce them into evidence. I have shown them to Mr. Imberman.

MR. IMBERMAN: Are you putting them in again?

MR. FINE: I am not. I thought I put them in the last time, but apparently I was mistaken.

There are copies annexed to my memorandum of law; they are the same things.

THE COURT: Of the last exhibit there -- I am confused, I thought that you said Exhibit B, included a letter from the state to the federal government dated July 14th and I see that and something coming back from HEW.

MR. FINE: There is a letter dated July 10th.

THE COURT: I don't see a July 10th. Let me give you this back.

Wait a minute. It is June 10th.

I am marking as Exhibit B the letter of June 10t from Mr. Budoff to Mr. Raymond Diehl, Acting Deputy Commissioner, Division of Medical Assistance, New York Department --

MR. FINE: The last exhibit marked at the previous hearing was Exhibit B. May I suggest you mark this exhibit C.

THE COURT: No. I am remarking them because of

the chronological order.

Then I am remarking as Exhibit C the letter of July 14, 1976, from the State Department of Social Services to Mr. Budoff with substantial attachments.

Now, the others can be dealt with.

MR. IMBERMAN: What is Exhibit A now?

THE COURT: Whatever was admitted the last time.

MR. IMBERMAN: Whatever was put in on page 10 originally.

MR. FINE: That is a stipulation. That was admitted, I think, into evidence.

THE COURT: All right.

MR. FINE: Your Honor, I should now like to offer into evidence the news release referred to in the affidavit in support of the application for the injunction by Mr. Hartline. This is the complete news release and I should like to offer that in evidence.

(State Exhibits B, C and D were received in evidence.)

MR. IMBERMAN: My problem with the news release is that I would like to be able to cross examine the gentleman who put out the news release.

THE COURT: Didn't you say it is attached to one of the affidavits already? I don't think it needs to be put

in. On a motion for preliminary injunction, I don't want to get hung up on the technicalitites. Whatever is in the evidence is at least in evidence to that state.

MR. FINE: It is an affidavit of Mr. Hartline, one of the officials, and he refers to this news release.

MR. IMBERMAN: Your Honor, counsel stipulated that he wasn't going to controvert.

MR. FINE: I am not. I just say this is a news release.

THE COURT: I don't think it is necessary to put it in evidence.

Now, I would like to get to the purpose for which the hearing was called, namely, to have evidence if necessary or argument in any event, on the extent to which approval is required, when it is required, to permit the state legally to commence the implementation of its regulations.

Mr. Fine, I do call on you first to explain what the state's position is in that regard. I am not sure that I thoroughly understand from your memorandum.

MR. FINE: Our position is very simple:

The statute under which we are operating is the Social Security Act and it requires that a state plan be approved by the Department of Health, Education and Welfare. The regulation, however, which the plaintiffs rely on, refer

to --

THE COURT: Which one are you talking about?

MR. FINE: Regulation 45CFR250.30(A)(2),which says in effect that a regulation with respect to hospital reimbursement rates shall, prior to implementation, be approved by HEW, and that it is not to become effective until approved by the Secretary.

The language of the statute itself requires the approval by the Secretary. It says nothing about, prior to the implementation of a new set of regulations becoming effective, such approval shall be required.

Sections 205B --

THE COURT: Isn't the word "approval" reasonably to be construed as meaning approval in advance? I mean certainly you wouldn't want to get it approved ten years from now.

MR. FINE: Ordinarily, your Honor, but I must tell you that there are other provisions of the Code of Federal Regulations which cast grave doubt on that and the grave doubt is cast upon it by this fact. That Regulation 45CFR205.5(B) provids for federal financial participation as to additional expenditures resulting from an amended provision of the state plan as of the first day of the calendar quarter in which an approvable amendment is admitted or on

the date on which an amended provision becomes effective in the state, whichever is later.

Now, we submit to your Honor that the regulations in issue here are approvable. I am not urging that they will be approved or disapproved. I am simply saying that they are approvable in the sense that they are regulations dealing with the precise issue of how a state may, under a previous plan which the HEW approved of, providing for prospective reimbursement, that these regulations are approvable.

As approvable, as distinguished from approved, we submit to you regulation 250.30(A)(2) is not consistent with the requirement that a regulation be approved prior to implementation. In other words, there is a dichotomy between the regulations.

Further, I should like to point out to you that ordinarily HEW is required to give 90 days, to act within 90 days after the submission of a state plan, unless there is an agreement in writing by which the state agrees that that period of time may be extended and because of negotiations or controversies respecting the plan.

Now, in the present case, most of the amendments, the amendments in question, were most ly submitted within less than 90 days from today. In other words, they are

comparatively recent.

Now, HEW, the thrust of our argument as I said in the brief and I would just dislike reading from it, but it seems to me that it sums it up so concisely that I have no recourse.

On page 6 of my memorandum --

THE COURT: I read it and I think I understand it but I just wanted to be sure I did.

MR. FINE: What I am dealing with is, shall I say, a minute point of law, a matter of exegesis of some words that are contained in the regulations and the statute.

I would like to tell your Honor something else I think is interesting:

HEW for years has let the state operate without withdrawing financial funds without approval of amendments to the regulations.

Let me cite to your Honor specific cases.

The last HEW approval of any amendment of a state lpan was on -- you know, HEW marks each transmittal with a designation number showing the year and the date of the transmittal. And the last approval of any amendment to the state plan was designated 74-2, and was approved on December 31, 1974.

Since then some eight amendments, starting back

in 1975 -- as a matter of fact, in 1974 -- have been submitted to HEW; the state has acted on them and HEW has never approved them.

THE COURT: Or disapproved.

MR. FINE: Or disapproved.

Never acted on them at all.

THE COURT: In other words, in a sense they are pending .

MR. FINE: They are pending. To be specific and since regional counsel for HEW is present here and the U.S. Attorney, I will read off the submittals on which there have been no action. I will read them in reverse chronological order.

7/12/76, the middle number, 76-41. Well, I can scarcely ask them to act on that. That involves one of these regulations.

THE COURT: One involved in this case?

MR. FINE: Yes, your Honor.

Submittal number 76-20, submitted on June 3, '76, which I don't believe involves these three regulations.

Submittals number 76-18, which was submitted on April 29, 1976 and which involves Regulation 76-14B.

Submittal number 75-62, which was submitted on December 17, 1975, which does not involve any of the

regulations in this case.

Submission number 75-61, which was submitted on December 17, '75, involves regulation 82-21K.

Submission number 75-60, submitted on December 17, '75.

Submission 75-33, submitted on July 17, '75.

Submission number 75-13, submitted on July 17, '75.

And submittal number 74-13 and 74-2, submitted on April 19, 1974.

My point is that HEW has never been as insistent on approval and yet has let the state act under these regulations and I submit that that is consistent with our position that regulations dealing with reimbursement -- after all the construction of the question is shall the federal government pay the state money, reimburse it money.

HEW has never cut back on New York State's reimbursement formula, despite the fact that these regulation have not been approved.

HEW has never insisted on, shall I say, nor has the state for that matter, in fairness to HEW, ever complained.

Now, a lot of what I say is primarily because I want to rebut any inference in your Honor's mind that the

state has not been as diligent as the HEW bureaucracy in thi area and I use the bureaucracy in no disparaging terms, because we understand that these are complex matters which have to be analyzed and thought through.

Reverting to my statutory argument, I think that what we have here is a set of regulations, the regulations we are now talking about, the three regulations, adopted basically in the face of the state's financial emergency, rushed down to Washington, to HEW's regional office in the last few months of the year when the impact of the emergency crisis came home and on which HEW and the state have not, sh we say, been able to resolve all the differences, but as the exhibit I introduced shows, at least the State Department of Social Services, whom I might mention is the state agency which deals directly with HEW -- under the 42 USC, each stat has to designate some agency to deal with HEW and in this case it is the Department of Social Services and the Depart- ment of Health has to act through the Department of Social Services and that is the thrust of the argument -- which is if we have not gotten the approval of the HEW, it is because they have 90 days in which to act and in any event, we can act on an approvable regulation as distinguished from requiring implementation of approval.

THE COURT: Thank you, Mr. Fine.

In the first instance --

MR. IMBERMAN: I think Mr. O'Connor ought to carry the brunt of this.

MR. O'CONNOR: Thank you, your Honor.

THE COURT: I am not suggesting that you should necessarily disagree with Mr. Fine. I haven't any idea what your position is but I would like it clarified.

MR. O'CONNOR: Well, your Honor, for the federal defendant, we do disagree with Mr. Fine with regard to the legal requirements and the issue that has been raised with regard to prior approval as opposed to approvable and as I understand Mr. Fine's argument, he says two things -- one, he is saying that the regulation relied upon, one specific requirement that there be advance approval, I understand him from the brief and the argument to be saying that that is inconsistent with the statute.

I also understand him to be saying --

THE COURT: The statute under the two regulations which are in conflict with each other.

MR. O'CONNOR: Yes, he also makes that argument, that they are inconsistent.

In this case, the statute and the regulations do gel by the terms and I don't think that it will be difficult to resolve the question by recourse directly to the language

involved.

The statute that the regulation is promulgated under and the statute that is in controversy in the present case is Section 42 United States Code, Section 1319(6)(A) and with the following subsections -- (A)(13D).

It is a short section and I wouldlike to read it to you in drawing your Honor's attention to the particular language involved.

1319(6)(A) states:

"A state plan for medical assistance must provide"-- and then the subsection (D) that I referred to has a particular requirement. It says this:

"The state plan must provide for payment of the reasonable cost of in-patient hospital services provided under the plan which have been developed by the state and reviewed and approved by the Secretary and (after notice of approval by the Secretary, included in the plan.)"

THE COURT: It is all part of D?

MR. O'CONNOR: Yes, your Honor.

So the first point, your Honor, is the statute itself by its specific language speaks about prior approval. It speaks about it in the following language that I have already emphasized -- after notice of approval by the Secretary, is when it shall be --

THE COURT: Let me ask, I don't know -- in the government's view, is there any difference between the need for approval of a plan and the need for approval of an amendment to a plan?

MR. O'CONNOR: Well, your Honor, I think in this particular case we are talking only about amendments.

THE COURT: We are but I wasn't able to gather whether (13)(D) refers to amendments specifically as well as the plan.

MR. O'CONNOR: It does not specifically state amendments. It talks about the plan shall apply and it is our position that this does not apply to amendments to the plan.

With respect to that statute, the Secretary has promulgated the regulation that is relied upon here, 45 CFR 250.30(a)(2), and this regulation tracks almost exactly the language of the statute. It states:

"State Plan Requirements:

"A state plan for medical assistance under Title 19 of the Social Security Act must, 2, provide for payment of the reasonable cost of in-patient hospital services as determined in accordance with methods and standards which shall be developed by the state and approved in advance of implementation by the Regional Commissioner."

jblt

So, the first point I make is there is no inconsistency between the regulation relied upon and the statute. The regulation tracks exactly the wording and inte of the statute.

That brings us to the second point. Is there some inconsistence between the regulations? Mr. Fine argues that there is. However, the regulation that he relies upon is 45 CFR Section 205.5 (b), and this provides -- federal financial participation. It starts:

"Except where otherwise provided, federal finan-cial participation is available. As of the first day of the calendar quarter in which an approvable amendment is submitt or the date on which the amendment provision becomes effec-tive in the state, whichever is later."

The point is, the section that Mr. Fine is relyi on starts with the words "except where otherwise provided," so the regulations come down to this type of scheme.

In general, the statute, the regulation relied upon by Mr. Fine applies for most types of amendments. The state can, if it submits an approvable amendment, it can be effective as of the first day of the calendar quarter in which it is submitted. That is the general rule.

However, the regulation itself says except where otherwise provided.

Now, both the statute and the regulations carve out a certain exception to that general rule and that certain exception is applicable where you are talking about reasonable costs for reimbursement of in-patient hospital services, so that is a key point.

THE COURT: What in effect you are saying is that regulation 250.30(a)(2) does otherwise provide?

MR. O'CONNOR: Exactly, your Honor.

And the key to the carving out is now we are talking about not the general financial participation, but now we are talking about reasonable cost of in-patient hospital services, which are the greatest percentage, so what the Congress did was carve out a certain section with regard to in-patient and it said, okay, generally we will let you put in an approvable plan, but when you are in the area of in-patient cost, you have to have the plan approved first, before you can implement it.

So, it is the Secretary's position that there is no inconsistency there between the regulations relied upon in the statute or in the regulations themselves and the way this developed is because of the difference between a general rule and an exception that applies to in-patient hospital services.

THE COURT: When you say it is the "Secretary's

position, I know who you represent, Mr. O'Connor, and I don't mean to question you, I don't mean to question the authority of your own statement in any way, but I would like to know just precisely what you mean by that.

Have you been in discussion for example with the General Counsel's office of the Department or is this argument your own argument; has it been a matter that the Department has had to consider before and rule on? What do you mean by saying it is the Secretary's position?

MR. O'CONNOR: Well, your Honor, as far as the background goes, the authority background, this has been discussed with Regional Counsel for the Department of Health, Education and Welfare. These cases have come up before. I am not saying precisely on the point, but the position as developed between myself and the Regional Counsel is that there is no inconsistence in these regulations.

These set out the legal requirements. That is the reason that the Secretary promulgates them, because he is following the statute and he wants to have prior approval with regard to the in-patient costs. The reason he wants that is because that is what Congress recommended.

THE COURT: What do you have to say to answer th point made by Mr. Fine that whatever the regulations say, the practice has been to allow the amendments to be

implemented even though they have not in fact been approved.

MR. O'CONNOR: I would like to do that and befor that I would like to make two brief remarks:

Mr. Fine has pointed out there is a 90 day requirement. There is no question of that. However, Mr. Fine also pointed out that with regard to the regulations that we are talking about, most of them have been submitted within 90 days, so there is no inconsistence between saying that the Secretary has not acted yet. They have been submitted recently.

The other point is this:

With regard to, and Budoff will be able to testi to this, approval that goes beyond the 90 day period, it is the policy of the Department of Health, Education and Welfare, to notify the state that it is considering these, that there are certain questions and to ask for an extension or to inform them that they are going beyond the 90 days.

As Mr. Fine also has stated, the state has never objected to any of the time requirements that we are talking about here and very few of the things that he mentioned -- he mentioned that I have nine submittals that he articulated very few of those, I think I only have two of them, which ar involved in the current controversy.

I do not know what is involved in the other

submittals.

THE COURT: That may or may not be relevant but that is not the point. What he is saying is as a matter of general practice, regardless of what the regulations say, they have not been literally implemented; that the government -- this is something I suppose we should hear from somebody about and I don't mean to say that is it will control but I would like to know what the practice is or has been.

MR. O'CONNOR: Well, I just wanted to bring to your Honor's attention before Mr. Budoff testifies, what Mr. Fine said about the eight submittals, we don't know exactly what they involve, we don't know if they fall in the category of approvable, as opposed to the in-patient; he did not specify that.

THE COURT: I know. We do not know a lot of things and lawyers cannot answer that for us and that is why we have the witness here.

MR. O'CONNOR: We can call Mr. Budoff.

THE COURT: Before you do that, Mr. Imberman?

MR. IMBERMAN: I have just one word to add, your Honor. There is nothing I can say to improve upon Mr. O'Connor's argument on the important part of the aspect and that is the alleged conflict between the statute and the

regulations.

He has answered it precisely.

I have no knowledge of what has been going on between the Department of Health of the State of New York and HEW and the practices that they have indulged in with regard to plan approvals, what they relate to in-patient reasonable cost or some other technical things that do not matter very much.

The only point I want to make, your Honor, is it hardly seems fair to me that if these two governments indulg in whatever practices they do, as between themselves, that can hardly affect the right of the plaintiffs here to ask your Honor to enforce the law.

THE COURT: Well, I would agree to this extent -- that it cannot be binding. I would not say it is irrelevant to whether I should grant the injunction against the state or not, at least if I come down to the question of whether the injunction should be granted, because approval has not been secured but certainly you are right; there are three parties here, not just two, and the interests of all three are necessary.

MR. IMBERMAN: I think perhaps it would be helpful to be hearing from the witness.

MR. FINE: May I speak for a moment on something

Mr. O'Connor said?

THE COURT: Yes.

MR. FINE: In discussing 45 CFR 205.5(b), he laid great emphasis on the opening words of the paragraph, "except where otherwise provided."

I submit that that modifies federal financial participation is available. It does not disqualify or minimize or negate my argument that if an approvable plan is submitted, that the state may act on that basis. The words "except where otherwise provided, financial participation is available." The "federal financial participation is available" is what is modified by "except where otherwise provided" and I do not think that language reasonably states the present implementation --

THE COURT: I am glad to have you add that argument but I won't attempt to construe the regulation on the bench here. It is going to be difficult enough to do it somewhere else.

Do you want to call Mr. Budoff then, Mr. O'Conno

In effect, Mr. Budoff is being called as a Court witness, if it makes any difference to anyone else. It doesn't make any difference to me who calls him.

SEYMOUR BUDOFF, called as a witness on behalf of the Court, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. O'CONNOR:

Q Mr. Budoff, would you tell us your position, please?

A I am the Associate Regional Commissioner, Medical Services Administration, Social Rehabilitation Services, HEW Region 2.

Q As part of your position, Mr. Budoff, do you have any connection with amendments to state plans submitted by New York State under what is called the Medicaid Federal Plan?

A Yes.

The regional office, Region 2, has the responsibility of reviewing plan materials on Medicaid submitted by the state.

Q Are you personally involved in this process?

A Yes, I am.

Q Would you please explain to the Court briefly the process of approval.

A Well, the process of approval begins when the state submits either a new plan material or a plan amendment.

That material has to be evaluated by my staff and myself.

It is evaluated to insure that, number one, it is consistent with federal statute, federal regulation and in order to make that determination, the material is evaluated and hopefully a decision is reached.

Q Now, when you say evaluated, why can't you tell just from looking at the piece of paper that is submitted whether it is consistent or inconsistent? What evaluations are there?

A The evaluation is to determine that what is being submitted, which very often is a complicated piece of material, often involving principles that have to be looked at and determinations made to insure that what is being submitted once approved would be consistent with requirements that exist in federal statute regulations.

Q Are you familiar with submittals entitled 76-18, 76-41 and 75-61?

Are you familiar with those submittals?

THE COURT: Those are the submittals of the three regulations involved in this case?

MR. O'CONNOR: Yes, your Honor.

A Yes, I am.

Q Could you explain briefly again, with regard to these specific plan amendments, what type of approval

process -- where are you in your approval process with regard to these three submittals?

A These three submittals in the main, relate to amendments to the methodology the state will use in order to determine reasonable cost reimbursement to institutions -- hospitals in particular.

Our review of those amendments requires that we, number one, evaluate what is being submitted as the amendment, try to make determinations as to whether or not the application of that methodology will indeed and in fact lead to the reimbursement of reasonable costs to institutions.

In order to do that, we have first reviewed the material. A number of questions were raised in our minds as to how this or these new regulations would be applied by the state and we are at the process now of having shared with the state our questions with regard to the specifics of the materials submitted and are seeking to hear from the state as to their representations of what they propose to do would in fact lead to reasonable reimbursement and in that way satisfy our concerns with regard to the material submitted.

Q Are you familiar with a requirement in the regulations that the Department of Health, Education and Welfare will approve, act within 90 days of the submittal?

A Yes, there is such a regulation.

Q One of these three regulations, of the submittal that I mentioned earlier, as far as you can recall, have any of them been submitted to the Department of Health, Educatio and Welfare before 90 days from now?

THE COURT: More than 90 days.

A 90 days ago? Yes.

Q Now, with regard to that submittal, what is your practice in light of the fact that you have gone over the 90 days?

A Well, when we are approaching the 90-day time limit, we make it a practice to notify the state that we are approaching the 90-day limitation and that we will be continuing beyond the 90 days to review this.

Q And how do you notify them? By telephone or meeting --

A By mail.

Q Has the state responded, has the state objected to any of these letters?

A Not to my knowledge.

Q Have they answered in any way? Have you received any communication from them so far as you know, sin the time you told them you would go beyond the 90 days?

A Specifically relating to the 90-day period?

Q No, any communication regarding the submittals.

A Well, yes, we did receive a communication from them on July 14th, I believe.

Q And as far as you can recall, is there any mention in that letter of an objection to the 90-day requirement?

A No, there was no such objection.

MR. O'CONNOR: I would like to have this marked as Government's Exhibit E for identification.

(Federal Exhibit E was marked for identification.)

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Q Mr. Budoff, I now show you State's Exhibit B for identification and State's Exhibit C for identification and Government's Exhibit E for identification and ask if you recognize these.

MR. IMBERMAN: Excuse me, are not B and C marked in evidence?

THE COURT: Yes.

I think he is talking about the covering letter.

A Just the covering letter or the attachments as well?

Q Just the covering letter.

A Yes, I recognize it.

Q Could you tell us what it is, briefly? What they are?

A Exhibit B is a letter that I wrote to the single state agency indicating to them that we had finished our review of the material that they had submitted in one of their submissions -- I don't have the exact number -- and we sent this covering letter along with the matrix of the areas that we wanted further clarification from the state about, requesting that they review the material and we would like to meet with them to discuss our questions around the material that had been submitted.

Q Could you explain briefly, what do you mean by a matrix?

A Well, it was a compilation of the results of our review, where we took each section individually and indicated where we had questions around that section, what those questions were, requesting that they prepare themselves to be able to satisfy us with regard to the questions we had raised on each section of that submittal.

The next exhibit is marked C, and this is the response that the state sent us to the letter of June 10th.

The following exhibit is marked E, and that is our response to the state's letter of July 14th.

MR. O'CONNOR: At this time I would like to offer in evidence the Government's Exhibit E for identification.

THE COURT: Show it to counsel.

MR. O'CONNOR: I offer this in evidence at this time.

THE COURT: Received.

Let me mark it.

(Federal Exhibit E was received in evidence.)

Q Mr. Budoff, would you tell us something of the substance of the letter, Government's Exhibit E.

THE COURT: Look, we don't have a jury here and I don't want this to become overformalized. Just tell me what it is about. It is in evidence. I can read it. What do you want me to know?

MR. O'CONNOR: What I want you to know is that from the previous letter there are certain exhibits, etc., that the state was supposed to have forwarded and they did not. The letter indicates that Mr. Budoff is asking them to forward what they previously said they would.

THE COURT: Is that right?

THE WITNESS: Yes.

THE COURT: Okay.

MR. O'CONNOR: I have no further questions at this time.

THE COURT: Well, stay there, because I would li to ask a few more questions.

BY THE COURT:

Q You heard Mr. Fine say that whatever the regulations say, although he argues that they mean different things than what your lawyer says, that the fact is that the government has always allowed the state to go ahead on the implementation of its amendments and if I understand Mr. Fine correctly, that is, and has never held them up, penalized them or anything else, even if they hadn't been approved.

Do you know whether this is the case? Do you know of any instance in which -- well, do you know if that is the case? I guess that is the best question.

A Your Honor, procedurely, what would happen in an instance where the state had implemented a regulation or implemented material that required a plan approval from us and which they had not recieved, our action would be to make a recommendation that they be found out of compliance.

Q Have you ever done that?

A Yes. There have been a number of areas where the state has been found out of compliance. I don't have specific knowledge at this time as to whether or not the material submitted by Mr. Fine led to such a compliance recommendation.

Q Let's take the three matters that are in issue here.

If the Court does not prevent the state from putting them into effect prior to your approval and the state does put them into effect or keeps them in effect -- I guess they are -- what will you people do about it?

A Well, if the state were to put this into effect absent our approval --

Q Let me ask -- are the regulations in effect at the moment or not?

MR. FINE: As far as the state is concerned, they are.

MR. IMBERMAN: If your Honor please, what has happened is rates have been promulgated based on these regulations.

THE COURT: That's what the regulation says. I am not saying what factual result would happen.

The state takes the position that their own regulations are in effect. It really means yes, we think we have done everything we need to proceed.

THE WITNESS: We would, in our quarterly compliance report --

Q When is that?

A I am sorry, your Honor, I don't know if it is th beginning or the end of the quarter, but there is a quarterl compliance report.

Q Calendar quarter?

A Fiscal quarter.

Q That is the same quarter?

A The federal fiscal year is beginning September lst, this year.

So it is not necessarily a calendar quarter. But we would find that the state is out of compliance in this area.

Q What would the effect of that finding be?

A That would be a recommendation that we would make. The administrator would then have to make a finding or rule that the state was indeed and in fact out of compliance, at which point there would be a compliance hearing.

Q You really don't need to go further. I can see the bureaucratic machinery working and the point is, even if you find them not in compliance, the house won't come tumbling down in a few days or weeks, is that right?

A That is an accurate assessment.

Q Now, the other question was this:

In your testimony and in your affidavit, you have indicated that there were certain areas of the proposed new amendments that are at issue in this proceeding that you wanted to discuss -- and I say you collectively, HEW -- wanted to discuss with the state. Do you know what those

areas were? And I think you said in your testimony that the had raised questions in the mind of HEW as to how or whether the proposed amendments would produce a reimbursement of the reasonable cost of medical services.

Is that one of the questions you wanted to talk over and if so, could you be more detailed in saying what the questions are?

A The problem thatwe have is that the state has submitted to us their regulatory material. Now, in order for us to make a determination as to whether or not this would lead to a reasonable reimbursement, we require further clarification on a number of things.

It is the responsibility of the state not only to promulgate regulations but to be able to support their position that these will lead to a reasonable, a reimbursement of reasonable cost.

One of the problems that we have is that we have the regulatory material but we do not have any of that back up analysis and one of the things we wished to discuss with the state is for them to be able to show us how this will lead to a reasonable reimbursement.

Q In effect, you are not suggesting that you have taken any tentative position on the merits, but just that you need more information?

A Right. That these are the areas where you have to satisfy us that this will indeed and in effect lead to a reasonable reimbursement.

THE COURT: Mr. Fine, do you have any questions to put to Mr. Budoff?

MR. FINE: No. I just want to ask one question.

BY MR. FINE:

Q When you spoke of the state being not found out of compliance, you understand the state plan embraces not merely part 86 of the Code of Health Regulations dealing with the form of reimbursement but the state plan also embraces a great many other problems, having to do with eligibility, the nature of services to be rendered, it covers a broad spectrum of requirements, much of which is not within the jurisdiction of the Health Department, but is primarily the responsibility of the Department of Social Services, so they might have been found out of compliance on other matters not having to do with the method of reimbursement, the methodology by which hospital rates are computed?

A That's correct.

Q In other words, do you recall specifically any case in which the state has promulgated a regulation in which HEW has found them out of compliance by virtue of the regulation not giving the hospital reasonable cost, remember

always that the New York State plan is a plan for prospectiv reimbursement?

Do you recall any? You don't have to but I just wondered if you did.

A I am not specifically aware of any such instances.

BY MR. IMBERMAN:

Q Mr. Budoff, would it fall within the purview of your office to make a determination as to whether a state plan provided for reasonable cost?

THE COURT: Could you read the question back?

Q I will rephrase it.

Would it come within the scope of the activities of your office to make a determination as to whether or not specific amendment to a state plan would or would not result in the hospital's receiving reasonable cost reimbursement?

A Is your question directed to hospitals generically or directed toward the instance that a particular hospital gets reasonable costs reimbursed?

Q Well, the plan itself is not addressed to specific hospitals; it is a plan that is applicable to all hospitals.

Now, suppose an amendment came through to a state plan which said, all hospital rates are frozen as of

1974 rates, and that becomes effective July 1, 1976.

Would it be the function of your office to decide whether or not that amendment did not produce reasonable cost?

A With regard to that hypothetical amendment?

Q Yes.

A With regard to that hypothetical amendment on the face of it, a freeze at a level would indicate that reasonable cost was not being reimbursed.

THE COURT: We are not asking about the merits. We are asking who in your outfit decides this.

Q Is it your office that determines it or somebody in Washington or do you make a recommendation?

A The delegation for the approval of plan material resides in the regional office. The delegation for disapproval of plan material resides in the central office.

We would make a recommendation to the central office and they would have to make the ultimate determination as to whether or not that--

THE COURT: If there was to be a disapproval?

THE WITNESS: Yes.

Q So, if a freeze regulation or a freeze amendment came through, I take it you would automatically say, this does not produce reasonable cost and you would recommend

non-approval? Am I correct?

MR. O'CONNOR: Objection, your Honor. It seems to be a leading question.

THE COURT: I would rather stick with the facts of the case, instead of a hypothetical.

Ask about the facts of this case, please.

Q Would you be prepared to make a recommendation on the 100 percent average limitation, which is one of the amendments in this plan or do you need more material?

A I think there is the obligation of the state to satisfy us that that does not contravene reasonable reimbursment to hospitals.

THE COURT: In other words, at least to the extent of your expertise on the subject, you do not equate the 100 percent average formula that is being proposed with automatic freeze?

THE WITNESS: No.

THE COURT: The witness previously said a freeze was bad on its face and would be disapproved and that he does not equate the state's present proposed 100 percent average with a freeze as being bad on its face. It may be bad or it may not be bad, but it is not bad on its face; is that right?

THE WITNESS: That's right.

Q Have you asked the state to supply you with additional information concerning how that regulation is going to work?

A We have requested meetings with the state to go into the areas where we have questions, that is one of the areas we identified that we did have questions around.

Q Have you asked for specifics or have you just said "We would like to meet and discuss it with you"?

A The request was a generic request, that we would like to meet and discuss. But we supplied them with a list of the materials that we had questions to and asked them to be prepared to respond to our concerns around the identified materials.

Q Do you have a copy of what you sent to the state?

THE COURT: Isn't it in one of the exhibits? All the letters back and forth?

Who has the exhibits, C, D and E?

MR. O'CONNOR: I do, your Honor.

Q Is that what you sent the state? What was just referred to?

MR. O'CONNOR: I think that your Honor has E.

THE COURT: Yes, I do.

(Documents handed to witness.)

(Pause.)

A Exhibit B is the cover letter that there was an attachment to and the attachment was the material that we had prepared in matrix form.

THE COURT: And it is the one that expresses your concern about the subject of 100 percent?

THE WITNESS: One of the items that we had some questions about.

MR. O'CONNOR: We don't have that attachment at this time, your Honor.

MR. IMBERMAN: Is it procurable this afternoon?

MR. O'CONNOR: Yes, it is.

MR. IMBERMAN: Perhaps we might get it, your Honor. At least I would like to have an opportunity to look at it.

Q Mr. Budoff, if a man limits the amount of money which a hospital receives arbitrarily so that it does not receive whatever it has spent to efficiently produce the hospital services, would that plan produce reasonable cost reimbursement?

MR. FINE: I object to that question.

THE COURT: I think it is objectionable, although I am sure Mr. Budoff is well qualified to answer.

Q Are those points raised in the attachment to the

letter that you referred to? The questions with regard to the 100 percent average limitation on costs.

A That is one of the areas that we have questions around.

MR. IMBERMAN: If Mr. Budoff would stay until this afternoon when I get a chance to look at it --

THE COURT: When you say "stay until this afternoon," I hope nobody will have to stay. If you want to look at what Mr. O'Connor has --

MR. IMBERMAN: He does not have the particular document.

MR. O'CONNOR: Your Honor, we have no objection to supplying it. At least I don't see why Mr. Budoff should have to remain.

THE COURT: I don't either at this stage of the game.

MR. IMBERMAN: Subject to what I look at, I might want to ask questions. I would like to look at it.

THE COURT: Well, does anyone here have it? It seems there may be a copy of it here.

MR. O'CONNOR: We are not sure if this is it, your Honor, and we prefer to make sure.

THE COURT: All right.

Thank you very much, Mr. Budoff.

BY MR. FINE:

Q Mr. Budoff, assume the state supplies you with the material you have requested to substantiate the fact that these new regulations comply with the statutory requirements the hospitals receive in-patient, the cost of furnishing in-patient Medicaid care. In your opinion, are the regulations, assuming the state again gives you the material you requested, in your opinion, and I assume that you have had some expertise in this field, are these regulations approvable?

I am not asking you to state whether they will be approved but whether they are approvable.

MR. IMBERMAN: I object to that. It is highly hypothetical.

THE COURT: Maybe so, but I am going to assume, Mr. Imberman, on the present state of the record, that they are approvable because as I see the word "approvable," if they weren't, then it seems to me that the Department of HEW would have written back and said what you have submitted to us cannot be approved under any circumstances.

That is not the position you took, is it? The position you took as I understand it, is you did not know whether it could be or could not and you wanted more information.

THE WITNESS: That's correct.

THE COURT: So I construe the situation as being one in which the regulations are approvable but they have not been approved.

MR. FINE: Thank you, your Honor.

No further questions.

(Witness excused.)

THE COURT: Mr. Fine, I take it that Dr. McCann has arrived?

MR. FINE: Yes, I think he has.

W I L L I A M F. MC C A N N, called as a witness on behalf of the State, having first been duly sworn, testified as follows:

THE COURT: Doctor, I am sorry to have brought you all the way down from Albany.

THE WITNESS: It is all right. It is not "Doctor."

THE COURT: Commissioner -- all right.

But there were some questions that I had as a result of your very interesting affidavit. I will let Mr. Fine ask the questions first and then if I am not satisfied, I will ask the questions.

EXAMINATION BY

MR. FINE:

Q Would you state your duties?

A I am head of the Division of Health Care Cost Control. We compute the reimbursement rates under the Medicaid program for hospitals, nursing homes. We have an input into the fees paid to practitioners. We review the Blue Cross reimbursement formulas, the rates, handle all appeals from the Medicaid reimbursement rates that are established, audit with our own staff and long term care facilities, in conjunction with the Blue Cross plans, the hospitals throughout the state.

Q And in the course of your activities, you have occasion, I suppose in connection or association with the Commissioner of Health, to issue and promulgate regulations as part of 86-10?

A Yes.

Q You are familiar with the recent correspondence and the recent regulations between the state and HEW about these new regulations.

Now, Mr. Budoff in his testimony referred to the word "matrix."

Can you explain that further? As I understand it it was a request by the HEW for a body of information or

material substantiating the new regulations. Am I correct about that?

A That is correct, sir.

Q And can you tell me a little bit about that matrix?

A Yes. The Department of Social Services, being the single state agency for the administration of the medica assistance program has the direct contact with the Department of Health, Education and Welfare through the regional offices.

The material that we prepare in the Department o Health that has to do with the reimbursement aspects of the program, are forwarded to the Department of Social Services where they are then forwarded with other additional material possibly, to the Department of Health, Education and Welfare

The review conducted in the regional office of any state plan material, often prompts many questions as to the intentions of the state, the impact of any proposed regulation and they will go back to the single state agency and raise these questions, even though the questions may be more properly answered by the Department of Health.

When this happens, in most instances, I believe the Department of Social Services contacts the people in th Health Department and we get together and each department

frames the answers that it has expertise in.

In this particular case, the matrix came in from the regional office of HEW to the Department of Social Services. Since there were many areas that were the primary concerns of the Health Department, I was asked to sit down with people in Social Services and discuss the items one by one on the matrix and then propose the answers from the stat to the federal government.

What the matrix really did is identify those particular areas by number of the proposed regulations that the federal government felt they had some problems with, either through lack of understanding, lack of clarity, need of more background and so forth.

One of the items of course was Section 80-14(b) and this is --

THE COURT: Is that the average cost question?

THE WITNESS: Yes.

A And I do not have the matrix here. If I remembe it correctly, the question that was specifically related to the average cost question was one word, whether we meant over or above, and let me explain a little bit:

When we were developing that particular regulation, at the time we were drafting it, we left a blank because we had not yeter determined the particular percentag

of average cost or lower than average cost that would be applied as a ceiling.

Consequently, we used the words, and I am doing this from memory, that the ceiling will be limited to blank overweighted average costs.

When the determination was made that we would use average costs as the base, someone with a pen stuck "100 percent" in. If you read it with 100 percent, it sounds like 100 percent over average costs, it sounds like 200 percent, which of course it is not intended.

But the question that was raised was not about 100 percent or whether we went 100 percent over average costs or 100 percent of average cost. That is my recollection of that particular area of the matrix.

So I did not think of that as being a material question that would require statistical --

THE COURT: Mr. Fine, I don't know whether you are asking questions along these lines and Mr. McCann is giving answers along them, because I think that this is the area that I am interested in as a result of the affidavit, and if so, it is not.

MR. FINE: I won't ask any further questions and leave it up to your Honor.

Q As I understand it, the words, "100 percent of"

were deleted and the regulation as now before HEW, simply uses the word "average."

A Yes.

Q Could that be accomplished by saying 100 percent of average cost and -- that in fact is corroborated by Mr. Budoff's affidavit.

BY THE COURT:

Q You say on page 9 of your affidavit, paragraph 24, you say:

"Hospitals have generally failed to respond to the State's cost control efforst and the average annual rate of increase in per diem costs in New York State hospitals from 1970 through 1974 was 11.98 percent."

I wonder whether you mean, first of all, by saying they have failed, and second, what you meant by saing they have failed.

You mean they did not come in with services as cheap as the state hoped, or that they were actually charging the state more than the true costs? What do you mean?

A Under our prospective rate system in New York State, we attempt to set in advance the levels of payment under the Medicaid program and the levels of payment under the Blue Cross plan as set by Blue Cross, and approved by the state.

When we set the prospective rate, it is based on the historical certified cost reported by the hospital, subject to whatever ceilings were in effect at the time and then those costs are projected forward, using the best indicators of inflationary trends that we can put our hands on and relating those inflationary trends to the types of expenditures that the hospitals have.

So the theory behind the prospective rate system was to establish the parameters within which we would expect the hospital to operate.

When I say that hospitals have generally failed to respond, what I mean is some hospitals have responded.

Q Then I understand the word generally.

What do you mean by "responded"?

A Respond by having our rates influence their cost patterns, so that their cost increases from year to year parallel the inflationary trends that we were setting --

Q I can't understand how your rates would influenc them.

The word cost is cost, it seems to me.

A Yes. However, in New York, between the Blue Cross Plan and the Medicaid reimbursement system, we have better than 50 percent of the hospital's business, under a prospective cost control formula and when the resources are

made available to the hospital, are requested, we would normally expect the hospitals to react by doing something with their expenditures.

Q All right . I understand what you mean by that.

The next question is on page 11, paragraph 29, and there you say:

"An analysis of 1976 rates for voluntary hospitals indicates that 83 are receiving a rate in 1976 that is lower than the 1975 rate. Of the 83 hospitals, 15 were not affected in any way by formula ceilings while 54 of the hospitals affected by ceiling penalties had disallowances which amounted to less than 2 percent of the hospitals' in-patient costs."

I take it that that means that even though the rate structure, acknowledgedly -- or the ceiling is lower in '76, there are 15 cases in which that did not have an adverse effect, is that correct?

A That's correct. The application of the formula produced no ceiling limitation.

Q And then the result of the total analysis is, I guess, is that only 9.6 of the voluntary hospitals which w affected by ceiling limitations had an overall cost reduction impact greater than 2 percent of in-patient costs?

A Your Honor, I have a schedule that certainly

everybody can see, that shows the breakdown of the percentage of penalty as related to the in-patient costs and the names of the hospitals affected.

THE COURT: I will leave it to counsel whether they want to go into that detail or not and I just wanted to be sure that I understand your statements.

I was the one who asked you to come down, so I assume they do not disagree with the facts you have stated here, but we will see.

Q You do say in paragraph 30 that two of the particular plaintiffs were not affected, is that right?

A That's correct.

Q I don't think the case turns on that basis, but it is interesting.

A Yes.

Q What is your implication in the last two sentenc of paragraph 31? There you say:

"The plaintiffs' position appears to be that if immediate relief is not granted, the hospitals have no alternatives other than to immediately reduce the quantity or quality of services below acceptable levels." And of course, that is an important question, particularly if I am ruling on a preliminary basis.

Then you say:

"In no way has it been established that the plaintiffs have no other option."

One can imagine what you have in mind. What options does the state believe that the hospitals have if th do not get the money for the timebeing?

A We are talking here of the 83 hospitals that I mentioned in paragraph 29, and 39 of them fall between the 1/10 of 1 percent category of in-patient costs.

Q Is that specified in your affidavit? It is in your affidavit?

A IT is in the exhibit.

THE COURT: Why don't we make that a Court exhibit.

MR. FINE: May I offer that in evidence, then? May I see it?

THE COURT: We will make it a New York State exhibit

MR. IMBERMAN: Your Honor, may I see it before i is received in evidence?

THE COURT: Yes. Here is a copy (handing).

(State's Exhibit E was received in evidence.)

Q And you were referring to the second item.

A Yes. Where the penalty is a percentage of in-patient cost in 39 of them fall between the 1/10 of

1 percent and another 15 fall between 1 percent and 2 percent and 15 out of the top, that means out of the 83, tha means that there are 14 of the voluntary hospitals and may I say I am only talking about voluntary hospitals --

Q That is all we are concerned with.

A Of 14 hospitals reflected greater than 2 percen in-patient costs.

Now, in studies that we have made over the years and I am sure that the same would be true in studies that ma have been conducted by Blue Cross, in some years the Medicaid rate of payment in hospitals may be 2 or 3 percent under cost. That is the way the formula works.

In other years, the possibility is that the Medicaid payment may be over cost, again, with the prospective system and it just seemed as though a hospital with a less than 2 percent or 39 hospitals with less than 1 perc on total in-patient cost -- well, it was inconceivable to me that a hospital would have no option other than to start dropping off services and quality of care.

When you talk about one patient on in-patient cost, you might as well be talking about one employee out of 100 and it just seems as though there would be other options available.

Q All right. I understand that.

The next question I had is this:

On page 12, in the middle of paragraph 34, although I understand the literal words, I would like to have more detail.

You say:

"In New York State, hospizals have been very carefully grouped as to size, area, type, charateristics, and other relevant factors. Therefore, a rigid ceiling is appropriate."

Therefore, I take it what you mean is the closer a definition of a hospital, the more appropriate an average is as a method of --

A That's correct. If you use a very broad definition and let us assume that you took all the acute care hospitals in the City of New York and you said, "This is a group," and even break it down by size, in order to have the reasonable cost attainable ceiling, the ceiling would have to be maybe 30 percent.

Q I understand that. To what extent is the method of defining groups changed this year in the light of the change of the cost formula?

A It has not changed.

Q You just meant that even if it had changed, it was already sufficiently narrow to justify an average approa

A Let me clarify that a little. When I said it ha not changed, I think I should have said it has not basically changed to restructure all the groups.

There will be certain groups where individual hospitals have been switched, but there has been no general overall restructuring.

Q The next question I had is on page 31, paragraph 38, you say:

"In determining an appropriate ancillary cost ceiling the Department of Health selected a case method,, rather than a per diem method."

And that I don't understand, because I don't understand the terminology.

A Let me explain it this way:

The payment system used under Medicaid and under Blue Cross is on a patient day basis. This is the reimbursement available to the hospital for patient day service.

In routine in-patient services, one can generall say that the patient receives roughly the same services regardless of how long he stays in the hospital and regardless of his particular illness, room, board and floor nurses generally.

When you get into the ancillary service departments it is a completely different situation.

For example, suppose you and I have to go to the hospital for the same particular procedure and you are healthier than I am and you stay five days and I stay ten days.

With the same particular procedure, the chances are you will receive the same ancillary services. Let us assume the ancillary services cost $100. On a per diem basis, the $100 of anciallary services is $20 per day in your case for the five-day stay and $10 in my case for the ten-day length of stay. So theoretically, you will be affected by ceiling on a per diem.

If we say instead, let's look at the discharge, and you are discharged and I am, it costs $100 for ancillary services for me and $100 for you.

Q So what you are talking about is the discharges?

A That's right.

Q Next, paragraph 39, there you say, the first sentence:

"The Department recognizes that individual hospitals within a group could certainly have costs in excess of average costs for a group that are completely justified."

That is a refreshingly frank admission and I wonder what the state's position is as to what ought to be

done in such cases.

A Yes. We could take all of the major teaching hospitals in the City of New York, hospitals about the same size, about the same teaching programs, located in the same economic area, geographic area, and in one or two of these hospitals, you may find some significant differences that could not be taken into consideration in developing a group. They are a pretty sold economic group. But when you start becoming concerned with the patient mix, the age of the patient, unusual services in one particular hospital as opposed to others, the volume of service, certain services in one particular hospital as opposed to others, you do find cost variances and justified variances.

A simple example --

Q You really don't need to give me an example. I had a day of testimony on this before from a gentleman who I am sure you will agree is competent.

What do you generally do when that occurs?

A What we have done is not the processing of an amendment -- let me go back just a little bit.

In part 86, we have an appeal procedure that specifies the particular circumstances under which the Commissioner of Health can establish an appeal.

The appeal procedure has now been filed with

the HEW and does not -- I beg your pardon. This was just recently filed.

Prior to this amendment, the appeal procedure did not provide any basis for the Commissioner to honor an appeal on the basis of a ceiling limitation. We recognize that the use of the average cost as a ceiling limitation would produce certain cases where it is just wrong; it shouldn't be applied to certain hospitals.

So we now have an amendment to our appeal procedures which states, for such relief -- this is 86-71-7. The last page of the affidavit.

What it says is for such relief a medical facility must demonstrate that its range of approved service patient mix, lengths of appropriate stays or other pertinent factors are direct causes for all or part of the costs in excess of the routine or ancillary ceilings.

Q I am sorry, you say it is part of your affidavi

A The attachment.

So what we are really saying is that certainly some hospitals are going to be affected by the ceilings that we have established and when you get into the area where they are affected by 4 percent or 5 percent --

Q Let us take the situation like Mount Sinai, which is well-known to you, I am sure, and as to which Dr.

Pomrinse testified that they will be adversely affected and he estimates to the extent of $2,000,000.

Now, assuming that they believe they are eligibl to appeal under the criteria that you have established, can they appeal right at this moment?

A Yes, they can.

Q And what do they have to establish to your satisfaction and how do they do it, to recoup?

A Mount Sinai is grouped with the large teaching centers in the City of New York since they are affected by a penalty to, I think Dr. Pomrinse's statement was $2,000,00 and I am sure he is right.

Q Is $2,000,000 of what they received last year or $2,000,000 below reasonable cost, presumably, is that right?

MR. IMBERMAN: No. The difference, I think Dr. Pomrise testified, between their cost and what the rate would be was about $2,000,000.

A Fine. But looking at the schedule I have, it shows Mount Sinai with a 2.7 percent penalty of in-patient cost and if I am not mistaken, Mount Sinai's in-patient cost would come close to --

Q That is close to 2,000,000.

A That's right. It is close, so since Mount Sinai

is affected by a penalty, when compared to the group of large teaching hospitals in the City of New York, this means that Mount Sinai is doing one of two things --

Q Wait a minute. It has not been established on the record that they are, if I understand this correctly and anybody is free to correct me if I am wrong, what has been established is that they =estimate that what they get from the state will be $2,000,000 less than their reasonable costs. That is not necessarily the same as saying, is it, that payments are less than 100 percent average.

Indeed, they will be 100 percent average; right? So how do you determine penalty?

A Your Honor, isn't that the same thing? If Mount Sinai Hospital was not being affected by a penalty, then one could say they would be receiving full costs.

Q I don't know what your definition of penalty is. If you simply mean that the adverse effect of this regulation is called a penalty --

A That's correct.

Q Then I understand. And it's not in comparison to the other hospitals, it seems to me. It is in comparison to what their own costs are.

A Well, the hospitals' own costs really form the basis for the penalty, when compared with the peer groups.

Q Explain to me what your procedure is. Dr. Pomrinse comes to you and says, "I have a 2.7 penalty."

A All right, Dr. Pomrinse has a 2.7 percent penalty of in-patient cost and let's say it is $2,000,000 just for conversation.

The penalty was determined by comparing his costs with the costs of teaching hospitals that are the same size and so forth.

Why is Dr. Pomrinse suffering a penalty in Mount Sinai? I can't answer the question. All I can say is his cost pattern is different for some reason. I think it is up to him to say "I am different from these other hospitals because I have these particular" --

Q He says "I have a great new building I just approved and I need money to run it and so forth."

I agree with you in theory that they have the facts, so it is not unreasonable to ask them to give you the facts and suppose he has given you all that material.

A If the hospitals can justify the differences in their costs as compared with the hospitals that they are grouped with, they will have their appeals honored.

Q Now, this is a very interesting thing because in reading your papers at home on Sunday, when I get the best work done, I made a note that it seemed to me that the new

approach of the state is to some extent a shifting of the burden -- that is, that you arenow asking people to show you why they should get more than average and you are asking them to establish that.

A It is not so much, your Honor, of shifting the burden, because we always felt that the burden was on the facility. It is focused a little sharper.

Q I think I have asked you all the questions I wanted to, but let me check.

In paragraph 4I, with regard to the requirement of Public Health Law or rather, with regard to the regard of the State Hospital Review and Planning Council, as I understand it, you asked them to approve what you did and they did not and it is not quite clear to me as to what you or Mr Fine consider to be the legal significance of their disapproval.

Is it implied that you think all you have to do is ask them and then whether they approve or not is irrelevant, or what?

A Your Honor, not being an attorney, I would prefe to have someone else answer that.

MR. FINE: May I answer, your Honor?

THE COURT: Yes, will you?

MR. FINE: Section 2807 subdivision paragraph 3

of the Public Health Law of the State of New York, specifies specific factors which the Commissioner of Health is to take into consideration in fixing rates, such things as comparabl groups of hospitals, size of hospital, location and so forth.

THE COURT: And the cost of educational --

MR. FINE: The very last sentence of the paragraph says that the Commissioner shall exclude so much of educational costs and teaching factors -- I will have to get the exact language -- as in his discration he shall deem appropriate and acting under that specific language, whether or not they approved or disapproved, the Commissioner exercise his authority and promulgated the regulation by which h said that 10 percent of the costs of the salaries of residen and interns shall not justifiably be included in the costs of hospital operations upon which rates shall be computed.

THE COURT: And what you have just said applies, that the Commissioner did not require the approval of the review --

MR. FINE: That's right, because the statute is explicit.

THE COURT: Where does the role of the, as you put it, of the Review and Planning Council originate? Is that by regulation or statute?

MR. FINE: By statute, but it does not require--for instance, the Review Committee Council, does not have to go into the question of the groupings of hospitals, it does not have to go into the question of areas --

THE COURT: I guess I will have to look at the statute.

MR. IMBERMAN: I would like your Honor to know this and I know this comes awkwardly in the middle of a witness' examination, but I feel compelled --

THE COURT: Go ahead.

MR. IMBERMAN: Your Honor has to read Section 2807 very carefully to read the precise language about educational salaries. I think your Honor should know that the administration introduced a bill in the legislature this year directly on this 10 percent reduction of the cost of interns and residents.

The legislature deferred to pass it.

Then they went to the State Hospital Review and Planning Council and decided, well, we will do it by way of a regulation and the council has to, according to law, pass the regulation.

The council refused to do it twice and it was only then when the Commissioner insisted that he was going to cut this out, that he did it on his own and said, "I have

the authority, regardless of what the legislature and the council did," and he does it by his own authority.

THE COURT: Thank you. I believe I have finished my questions to Mr. McCann.

MR. FINE: I just wanted to correct one observation.

The reason the legislature did not pass the bill on which my learned colleague referred, was that they were advised that it would be done by the Commissioner of Health.

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jbal McCann-cross

CROSS EXAMINATION

BY MR. IMBERMAN:

Q Mr. McCann, did the Department of Health issue rates for reimbursement to the hospitals for Medicaid-paid hospital costs of 1975?

A Yes.

Q And were those rates supposed to represent the reasonable cost to the hospitals of providing service?

A Yes.

Q Now, in computing the 1976 rates you used a trend factor, didn't you, which you applied to basic rates?

A Yes.

Q And is it true that that trend factor was supposed to compensate for the cost of the inflation, the increase in hospitals' costs over the year?

A Yes.

Q These were costs over which tyey had no control, am I right, because of inflation?

A On the direct expenditure side, yes.

Q What was the trend factor for, say, the New York teaching hospitals for 1976?

A Mr. Imberman, I don't have those.

jba2 McCann-cross

Q Let me suggest to you 8.65 per cent. Does that sound familiar to you?

A No.

THE COURT: No, it does not?

THE WITNESS: No. May I clarify it?

THE COURT: Yes.

THE WITNESS: Under the Medicaid system we trend for two years, from '74 to '76; we trend first to go through the intermediate year of '75, which was a little different than was described for Blue Cross the other day, and then we figured for '76.

The figure that seems to ring a bell to me for 1976 -- and this is trended from 1974 -- I think was somewhere in the neighborhood of 18 per cent.

Q Which included a two-year --

A Two years.

Q And in the computation of the two years wasn't there somewhere in the arithmetic that you did some sort of computation of what '75 to '76 would be?

A Yes.

Q And wasn't that about 9 per cent?

A Yes, I think it is probably close. I do not have the papers.

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jba3 McCann-cross

Q Well, let me ask you this: Isn't it true that the Department of Health expected that the hospitals' costs of operations -- let's limit ourselves to New York teaching hospitals -- would go up in 1976 over 1975 in somewhere about 9 per cent?

A On the basis of our indicators, yes.

Q Now, you actually issued your rates on July 1st or July 2, 1976, am I right?

A In that time frame some place, yes.

Q By that time didn't you already see from what had happened in the year that the hospitals' costs were going up so that your 9 per cent expectation at the beginning of the year was being fulfilled?

A No, I wouldn't say that, Mr. Imberman.

Q Do you have any figures on that? Did you make any studies on it?

A No.

Q This is just off the top of your head?

A Not completely. For example, if I may give you an example --

Q No. Mr. McCann, I would appreciate it if you answer the questions.

If you say no or yes, that's an answer. If I want an explanation I will ask for one.

jba 4 McCann-cross

Let me ask you this: In connection with the 1976 rates which the department promulgated, did the Department of Health make any study from which it determined, for example, that the cost of treating Medicaid patients at Mt. Sinai Hospital would decline by about 6 per cent over last year?

A No.

Q Did the department, in connection with the rates which it promulgated for 1976, make any study which showed that the costs of treating Medicaid patients at the New York University Medical Center would decline about 10 per cent?

A No.

Q In connection with its 1976 rates did the department make any study which determined that the cost of treating Medicaid patients by any voluntary hospital in the state would decline this year as compared to last year?

A No.

Q In connection with the promulgation of its rates did the department make any study which showed that any item of costs in the voluntary hospitals during 1976 had been or would be incurred in an unreasonable manner?

jba5 McCann-cross

MR. FINE: May I ask that question be restated? I didn't understand it.

(Question read.)

Q I am asking you that question in relation to the concept of reasonable cost that is in the Medicaid statute.

MR. FINE: I object to that question. It seems to be not only confusing but I don't know if it can be answered.

THE COURT: He can answer it by saying he didn't make any such studies.

I take it what Mr. Imberman is trying to find out is whether the state has any studies that show that the costs had been inflated anyway.

MR. IMBERMAN: Or unreasonable in the context of the Medicaid statute, which talks about reasonable costs.

A Would you like me to speak to the reasonable cost of the issue?

THE COURT: No. He would like to know whether you made any special studies on it. Let's call spades spades.

The state presumably believes -- and I assume this -- that more money is being spent to provide

services that are being rendered than necessarily needs to be spent.

Am I fair in assuming that that is the attitude of the authorities of the state?

THE WITNESS: Yes, sir, any ceiling.

THE COURT: Well, the ceiling at least might say, "Look, if you spend more than that you do it on your own." But where the requirement is that you must pay reasonable costs, then if you establish a ceiling you are implying that anything more than this is unreasonable.

THE WITNESS: That's correct, sir.

THE COURT: And Mr. Imberman is simply saying did you make any studies as to that that found that certain things are unreasonable or was it the overall level of costs that led you to the conclusion or what.

THE WITNESS: I think, your Honor, the best way I can answer the question is in --

MR. IMBERMAN: If your Honor please, I think I would like to have an answer to the question.

BY MR. IMBERMAN:

Q I want to know whether the department made any studies to show any unreasonable costs.

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THE COURT: Any specific studies.

A I have trouble because I am not sure whether an analysis is considered a study.

THE COURT: Tell us what there is.

Q Have you got something in writing?

A This is what I was attempting to do.

Q Does the department have anything in writing which you could call an anlysis or a study or anything else which showed that hospitals, the voluntary hospitals, in the State of New York had incurred costs in an unreasonable manner?

A Mr. Imberman, I don't like to be sort of dense, but you use the term "unreasonable" and "reasonable" without defining your definition or mine.

Q Reasonable costs as defined in the Medicaid statute which you have been living with for many years, Mr. McCann.

THE COURT: Well, let's say approximate actual costs.

MR. IMBERMAN: All right.

THE COURT: That's what the court decision is so far, is it not?

But let's say -- I don't care. I am willing to take your definition of reasonable.

MR. IMBERMAN: Well, I would like an answer to the question first, your Honor, and then if he wants to expand on it we will see.

A I'll answer very quickly.

THE COURT: What have you got? Never mind his definition. You have something in mind, apparently, and whatever it is, tell us.

A Fine. Let me. In 1976 the department reviewed its reimbursement methodology --

THE COURT: It's own?

THE WITNESS: It's own reimbursement methodology.

A -- and took a look at the ceilings being used and many things in the reimbursement formula to determine whether the application of that formula actually produced costs that were related to the efficient production of services, which is in the state law.

Now, in looking at this we made a determination that it did not and that when we first started the formula as I mentioned in the affidavit it was not a one-year or two-year thing, it was a long-range program.

During the years there are many things that deterred the department from making changes in that formula, ancillary services,for example. We didn't

have one.

MR. IMBERMAN: If your Honor please, I don't think I am getting an answer to the question.

Q If you have specific studies or something, fine, but you are talking generalities.

THE COURT: It is not generalities, but the studies that you have made, as I understand it, you haven't studied a particular hospital or group of hospitals which state that the costs that they are in curring or charging us are not the reasonable costs of the services they provide, have you?

Have you done anything as specific as that? I have no reason to believe you haven't or have --.

A Only two groupings. In other words, we have an analysis of all the hospitals in the state grouped with their peers, looking at the range of their costs as comppared with other costs.

THE COURT: You have?

THE WITNESS: That's an analysis and I don't know whether that comes into his definition of studies.

THE COURT: Never mind.

A Every hospital grouped with its own costs, seeing how far they range from the average in that

particular group we have looked at or traced hospital costs from over periods of years, showing what the costs went up as compared to the increase in our rates, inflation factors.

THE COURT: In doing all of this comparative analysis, how have you done it? Is it simply that if a hospital -- I know, for example, your ceiling was 10 per cent above 100 per cent --

THE WITNESS: That's correct.

Q If you had a hospital that was 20 per cent above 100 per cent did you and your analysts say, "Well, 20 per cent above is almost certainly unreasonable," and let it go at that, or did you inquire into what was happening at that hospital and inquire whether it was over 20 per cent over?

A This gets back to something we discussed before, the burden of proof and that hospital would be affecte by the ceiling at the 110 per cent level of the prior years. It is then up to that hospital to make its own --

THE COURT: Did hospitals ever do so?

THE WITNESS: Yes, certainly, constantly.

THE COURT: Did you ever conclude that any particular hospitals were unreasonable, that their

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costs were not reasonable?

THE WITNESS: Yes. That would be concluded by our denial of an appeal.

THE COURT: Was that true of any of the hospitals that Mr. Imberman has asked you about, the New York State teaching hospitals?

MR. IMBERMAN: The only two I asked about were Mt. Sinai or New York University, and that was 1976, and that's all I asked.

THE COURT: Well, let's go on.

Q You told the judge just a little while ago that you had statistics on hospitals and you compared their costs with their peers and their peer groupings and you would determine that some hospitals had higher costs than others, am I right?

A Yes.

Q If you found a hospital that had a higher cost than another hospital that you thought was comparable, what would you do?

If in the studies that you just mentioned to the judge you would find that hospital A might have a higher per-diem cost than hospital B which was within its peer group, what did you do?

Let me withdraw that and say at what point

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did you consider the difference unreasonable?

A In 1976 we considered it unreasonable when the cost went over the average cost for the group.

Q But you haven't looked at any hospitals for '76 on 100 per cent averages, have you?

A We are looking at 1974, which is the basis for the '76 reimbursement.

Q But my question to you is what did you do if you found a hospital that had a higher cost than another hospital?

A In 1974?

Q At the time that you mentioned to Judge Lasker you made the studies and you compared costs. Did you do anything?

A These are 1974 costs and the hospitals were analyzed to make a determination as to the appropriate ceiling which should be placed on 1974 costs.

Q Did this happen in the year 1974?

A Oh, no. It happened in late '75.

Q Let's take in the year 1974. If you looked at the costs of hospitals and you found a hospital which had a higher cost than one in its peer group what would you do?

A Sir, I can't answer that question. 1974, in that year, we would not have hospital cost data. We wouldn't have the hospital costs --

THE COURT: I don't understand Mr. McCann to have said or say that they do anything. They get this information for the purpose of developing policies and he says that it is not up to them to do something if the hospital spends too much money, the ceiling will stop them.

THE WITNESS: That's correct.

THE COURT: And if the hospital thinks something ought to be done, they are supposed to come to you, is that correct?

THE WITNESS: That's correct.

THE COURT: Let's assume, however, a case which Mr. Imberman has not necessarily posited. Supposing a hospital's actual costs are 95 per cent of average or 90 per cent of average, which they get out of it it anyway, don't they?

THE WITNESS: No, sir, their own costs.

Q I mean if they are below average --

THE COURT: I don't understand that. How do they get their own costs if it is prospective?

THE WITNESS: A hospital's 1976 rate is

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based on reported 1974 costs. So when you look at 1974 costs and you find a hospital whose costs per unit of services is 95 per cent of the average, that hospital is unaffected by ceilings. They actually get their reported costs printed forward, which, incidentally, is the 15 hospitals that we have.

THE COURT: I understand.

Mr. Imberman, go ahead.

BY MR. IMBERMAN:

Q Let me ask you one other question on studies that you have made in connection with the promulgation of the 1976 rates.

Did you make any studies from which you were able to determine that any of the voluntary hospitals which are involved in this case, which is all 275, were rendering services in an inefficient manner?

THE COURT: I think the word "inefficient" is too arguable.

MR. IMBERMAN: I am using it because it's a word of art, particularly in the state statute, which talks about hospitals being reimbursed for the reasonable cost of the efficient production of their services, and I am sure Mr. McCann is familiar with that phraseology.

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THE COURT: If you want to ask him did he make any studies in relation to the question of whether hospitals were providing services efficiently or not, you may do that, so we don't have worries about whether they were efficient or inefficient.

A May I answer you this way: When you take hospitals and put them in a group and you have a good group of comparable hospitals and some hospitals are 20 per cent higher than other hospitals, certainly the question of efficiency has to be raised.

Now, if you call that a study, the answer to your question is yes.

Q I am asking whether you made any specific studie from which you determined that any voluntary hospital in the state was rendering medical services, hospital services, in an inefficient manner.

THE COURT: Only to that extent.

A Yes, to that extent, sir.

Q The only extent that you are saying is that if you compared a particular hospital with those in its group, if its average cost, its per-diem costs, were higher than the average of the group you would say that is inefficient?

A No, I would say something different.

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Q What would you say?

A I would say that that hospital's cost patterns certainly raise questions. The rated average ceiling puts a penalty on that hospital. The hospital's position is now to come in and establish that it is providing services efficiently.

Q Mr. McCann, what I am trying to find out from you is at what point, if any, do you consider that a hospital is inefficient or rendering services inefficiently when its cost varies to any degree from the average?

A In 1976 the point is the average. There is no one particular point to identify reasonable cost.

Q I'm sorry.

A Reasonable costs can be defined in a variety of ways, depending on the definer, and we defined it since 1976 by placing a ceiling on the average. Anything above the average we have determined should not be reimbursable --

THE COURT: Well, the problem, of course, which is represented by this lawsuit is that the state is not free to refine reasonable cost in any way that is inconsistent with the federal statute.

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It may be held that your definition is correct, but while it is philosophically true to say that reasonable cost may be defined 100 different ways in a legal proceeding, it has to be defined in accordance with whatever the law says it is.

THE WITNESS: If I might --

Q Please limit yourself to answering my questions.

A Yes, sir.

Q You are saying, in effect, that if you take a group of hospitals and you average their costs, that any hospital which has a cost above the average, and there must be some, is rendering services inefficewntly and has unreasonable costs?

THE COURT: No, I don't think so, Mr. Imberman. There is no reason to put words in his mouth. I understand entirely what he said. You can disagree with it, but what he said is, "We are taking the position this year that the definition of reasonable costs is average costs. Anybody who is above that as far as we are concerned has to show us why they are above that and give us a reason why."

THE WITNESS: Yes, exactly.

MR. IMBERMAN: Oh, no, your Honor.

BY MR. IMBERMAN:

Q You immediately penalize a hospital, don't you, under the 100 per cent average cost?

A Yes.

Q If it is above the average?

A Yes.

THE COURT: Yes.

Q And the hospital gets less. You promulgate a rate which is less than its cost?

A Yes.

Q Without looking into whether or not the reason for its cost is perfectly justified?

THE COURT: That's why I talked in terms of burden of proof.

We are really talking about, and it is an important question, who is supposed to do what to establish the reasonable costs. And as I understand the state's present analysis, it says it will go so far and accept that as being reasonable. Beyond that you have got to prove to us that it is reasonable.

THE WITNESS: That's correct.

MR. IMBERMAN: Your Honor, I don't think --

THE COURT: Let Mr. Imberman finish and

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then, Mr. Fine, I will hear from you.

I don't mean wait until he finishes the questioning.

MR. FINE: I wanted to say something about the questions, the nature of the questions. He is in effect saying that because the hospital is penalized, it is necessarily a finding that the hospital is inefficient. I don't think that Mr. --

THE COURT: Let's leave it to him to argue whether it is. The purpose of the questioning is that he is trying to bring out information, not to raise arguments.

BY MR. IMBERMAN:

Q You would agree, Mr. McCann, would you not, that a hospital may have a cost which is above the average and still be operating at 100 per cent efficiency?

A Yes, I would.

Q And that the reason it is above the average is something that could be completely beyond its control?

A YES.

Q Now, Mr. McCann, is it not true that the reason that the department reduced the limitation on routine costs from 110 per cent of the average,

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which it always was, to 100 per cent of the average was because you were told that the state had to cut its outgo of Medicaid moneys?

THE COURT: I think that's an interesting history but the more I think about it, the less legal relevance it seems to have. Because if the formula is okay, it doesn't make any difference what the motivation is. And this is in a sense a quasilegislative Act.

MR. IMBERMAN: If your Honor please, it seems to me that if both the Health, Education and Welfare Department and the courts have held that a freeze is illegal as far as the Medicaid status is concerned, then it seems to me when you, in effect, reduce the rate to a freeze rate or below by imposing artificially an average to create that, you are doing the same thing, and motivation is important.

THE COURT: I'll agree with you. First of all, I don't think you need to ask the witness the question because I don't think there is any dispute about that. But to go on to the argument you just made, I think it may be evidence that the rate ultimately reached does not reflect reasonable costs but they are not prevented by the Medicaid statute from

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getting together and saying, "Listen, we have got to cut the costs," if they can do it legally.

MR. IMBERMAN: I thought it was relevant because the argument that seems to be presented is we want to get hospitals, after years of 110 per cent and now the study says 100 per cent is better, when in fact it seems to me the 100 per cent average was created only because there was a "U" case, we have got to cut costs and this is one way of doing it.

THE COURT: As I say, I think that is perfectly reasonable for a "U" case to be made because of the fact of the previous formula being too generous. And I am not saying that it was, but it theoretically could be.

I would like to explore further with the witness the question of appeal. Because the analysis that I have been making that you say is correct as to what the state's position is assumesd that if on appeal a hospital shows you that its costs above average are reasonable, an adjustment will be made to see to it that it gets reasonable cost, is that correct?

Let's say Mt. Sinai shows you that their reasonable costs are 5 per cent above 100 per cent. What happens then?

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THE WITNESS: Yes, sir. They would. Just exactly the way you put it. Their costs are over the average and they come in and are able to demonstrate the reasons why the costs are over the average, are justifiable, they would, and that would be the basis for the appeal.

MR. IMBERMAN: If your Honor please, it seems to me that a formula which requires 50 per cent of the hospitals to take appeals --

THE COURT: Well, that's for legal argument.

Are there any further questions?

MR. IMBERMAN: Yes.

BY MR. IMBERMAN:

Q Mr. McCann, would you look at your affidavit, at paragraph 24, and I would like to follow up on something the judge asked in there.

Have you got it?

A Yes.

Q When you said the hospitals have generally failed to respond to the state's cost control efforts, the state fixed the Blue Cross rates, am I right?

A Approves them, yes.

Q And the hospitals have to live within that

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sum of money as far as their costs are concerned, isn't that so?

A If that's all the money they have, certainly, all that is available to them, they would have to live within the anticipated service revenues.

Q And the same as the Medicaid, they are established by the state and that's what the hospitals get?

A Yes.

Q And that represents in most of the hospitals over 50 per cent of what their income is, isn't that correct?

A Yes.

THE COURT: The total of the two items?

THE WITNESS: Yes.

Q You said in that same paragraph that in New York City the average annual rate of increase during the period 1970 to '74 wasapproximately 13-1/2 per cent, is that correct?

A Yes, sir.

Q Now, what you are talking about its the average rate of increase in per-diem costs, correct?

A Yes.

Q How much of that rate was established by

your trend factors in each one of those years?

A How much of that rate?

Q Of that increase. Sorry. The percentage increase.

A This is an increase in cost.

Q I understand that.

A And yours is in rate. You mean how much did our rates go up during that period?

Q No. You had a trend factor in each year, am I right?

A That's correct.

Q In which you anticipated that as a result of inflation the hospitals' costs would go up in the coming year and you incorporated that trend factor to give them more money because of inflation, am I right?

A That's correct.

Q What I am asking you, sir, is in this average of 13-1/2 per cent how much of that increase is inflation responsible for?

THE COURT: Just approximately.

A I am not sure whether I have any papers that I can give you on that.

Q Let me ask you this: The trend factors for each year would have been your estimate at the

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beginning of the year of how much inflation was going to push up the hospitals' costs, isn't that so?

A That's correct.

Q And if the trend factor for those five years that you are talking about was 10 per cent, then the actual increase, the adjusted increase, would only be 3-1/2 per cent, isn't that so?

A Over inflation as computed by us, that's correct.

Q In addition to that, there would be increases in hospital costs as a result of new programs that the Health Department had approved, isn't that so?

A That's correct.

Q And there would also be increases in the hospitals' costs as a result of new technologies that had come along that the hospitals were using, isn't that so?

A Could be.

THE COURT: I am aware of certain things.

MR. IMBERMAN: Open-heart surgery is a great advance but it is horribly expensive, your Honor. It is as simple as that.

Q Are you familiar with Professor Dowling's study

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that he made for HEW?

A Yes.

Q Have you read his study?

A No. His study has not been released as yet.

Q Have you read the draft?

A Parts of it.

Q Are you familiar with the fact that he compared for HEW the costs of hospitals in downstate New York since 1970 with the costs of hospitals in three other large cities?

A Yes, I am.

Q Which were the cities? Do you know?

THE COURT: Let's not play a guessing game.

A Chicago, Philadelphia and Cleveland, I believe.

Q And that was a study to find out what the result of prospective reimbursement was, isn't that correct?

A Yes.

Q And did Professor Dowling in that study come to the conclusion that prospective reimbursement in the downstate New York area had decreased very

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sharply the reate of increase in hospital costs?

A I am not sure about the word "sharply." He came to the conclusion that there was a decrease.

THE COURT: You mean there was a deceleration in the rate of increase?

THE WITNESS: In the rate of increase, as compared to the three control cities.

Q As a matter of fact, he said the rate of increase in New York, once you adjusted for inflation and outpatient costs, was only about 1.9 per cent a year, isn't that so?

THE COURT: If he did, he did. Why does the witness --

A 1.9 per cent a year?

Q Yes, average.

A Increase in costs.

THE COURT: I will cut off the question on that point. If you want to put the study in evidence, that's all right, but don't test Mr. McCann on it.

Q I would like you to look at your affidavit at paragraph 21, page 8, which I want to ask you a question about.

A Yes.

Q You have a subparagraph No. 1 there, and in that paragraph you are talking about how prospective rate formulas work. And you say that the costs reported by hospitals must be challenged to eliminate on a broad base those costs not related to patient care and unjustified cost variances among hospitals of approximately the same size.

Do you see that?

A I am not sure what page you are on.

Q Page 8, paragraph 21. It is your affidavit.

A Yes, I have it.

Q Read paragraph 21, and particularly sub-paragraph 1.

(Pause.)

Q What you are saying is that in the formula what you have to do is to eliminate unjustified cost variances among hospitals of the same size, right?

A Yes.

Q And I take it then that justified cost variances are permissible?

THE COURT: There is no dispute about that.

A Yes.

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Q Then would you mind telling me how you can have a permissible justified cost variance when you have 100 per cent average limitation?

THE COURT: I feel like we are bogging down here, Mr. Imberman, and most of the questions are argumentative rather than fact-finding.

I could answer that question myself at least two ways. First of all, you have cost variance below 100 per cent and, secondly, we have discussed the question of the appeal procedure, which I assume will allow some variances above. Is that correct?

THE WITNESS: That's correct.

Q Then please take that Exhibit E, the one that you produced, the chart. You have the caption there "Penalty as a per cent of inpatient cost," and what year are those costs?

A '74.

Q '74?

A That's the cost base for the penalty.

Q But we are talking about a 1976 rate, aren't we?

A Yes, we are.

Q Now, when you say, for example, that Mt. Sinai has been penalized 2.7 per cent, you say that is

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the amount of its penalty as a percentage of its costs?

A That's '74 costs.

Q '74 costs? But Mt. Sinai Hospital has filed an affidavit by Dr. Pomrinse which indicates that it's 1976 costs are $270 a day and the rate that you promulgated for 1976 for that hospital is $240 a day.

Now, that is susbstantially more than 2.7 per cent, isn't it?

THE COURT: Yes.

A Just that straight comparison.

THE COURT: I'll take judicial notice.

MR. IMBERMAN: The point I am trying to make is this is a very deceptive document.

THE COURT: I understand the point. The 20 million and the 2 million or the 19 million and the 2 million is more like 9 per cent the way Dr. Pomrinse looks at it.

MR. IMBERMAN: I think they have been penalized at least 10 per cent of their 1976 costs.

THE COURT: Right.

THE WITNESS: No question, so I can't comment.

Q Do you know how many hospitals in total were penalized, to use your language, by the new ceilings,

the 100 per cent ceilings?

A I do not have that information with me. I have just looked at the voluntary hospitals. It'S available.

Q Let me ask you one other question.

Did the Department of Health make any study to determine that 10 per cent of the costs of the salaries of interns and residents represented educational activities? Have you got any study?

A The department relied generally on studies that have been made but I could make them available, if you wish.

THE COURT: Are you talking about the NLRB?

THE WITNESS: Yes, and the National Institute of Science.

Q Do you know how many hospitals the NLRB study was based on?

A No.

Q Did you know that it was based on a study of one hospital?

A No.

Q In your opinion, would a study made on the basis of one hospital be valid enough for the De-

partment of Health of the State of New York to act upon?

A I can't comment. Are we talking concept, philosophy or dollars?

Q I am talking what you, William McCann, would do. Would you accept the study of one hospital in making the changes based on millions of dollars?

A Depends on the area.

Q Yale, New Haven.

A It depends on the area that we were talking about. I find it hard -- I would think if you took the study of one hospital and you found the cost 40 per cent under the average of the cost of the group, that would be improper. In another situation, you look at one hospital and you find that you are looking merely to find the philosophy and concepts, it might be appropriate.

Generally, no.

Q Do you think it is statistically valid to use one hospital?

A I would say generally, no.

Q Has the appeal procedure been approved, the procedure you are talking about?

A By whom, sir?

Q By HEW.

A No.

THE COURT: Is it at the same level of approval by the state and submission to the federal government for approval as the rest of the amendments?

THE WITNESS: Yes.

MR. IMBERMAN: I don't think this is filed yet.

THE COURT: That's what I am trying to find out.

Let's be very clear about it, Mr. McCann. Is the appeal procedure in exactly the same status as the rest of the amendments? Is it an integrated plan or -- I don't remember hearing about the appeal procedure in the early part of this case and I want to be sure that I understand it.

THE WITNESS: Because of the relationship between the federal government and the state, the single state agency, all I can really testify to is that this has been submitted, the single state agency, for submission to HEW.

THE COURT: And in the same fashion and approximately the same time or as part of the material submitted with regard to the three regulations?

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THE WITNESS: This was a later submission.

THE COURT: How much later, approximately?

Mr. Fine, do you have any information as to the present status of the proposed appeal procedure?

MR. FINE: Your Honor, I know that it was adopted very recently by the state.

THE COURT: Do you know if it's been submitted to HEW for approval?

MR. FINE: I'll have to find out.

THE COURT: Do you know, Mr. Budoff?

MR. BUDOFF: We have not received a submittal on a new appeals procedure.

MR. FINE: I gather it has not been submitted to HEW.

THE COURT: I will assume it has not unless I hear to the contrary.

MR. IMBERMAN: I have no more questions, if your Honor please.

THE COURT: Very good.

MR. IMBERMAN: I have some other things I would like to take up, however.

THE COURT: Yes.

Do counsel have any further questions of the witness?

MR. FINE: I just want to clarify Exhibit E.

REDIRECT EXAMINATION

BY MR. FINE:

Q Mr. McCann, will you explain, please, exactly what you mean by penalty as a percentage of inpatient costs referring specifically to the years involved?

I understand what you mean by penalty. That was the penalty imposed basically on the 1976 rate for failing to reach the average. But will you explain to the court exactly what that heading means in Exhibit E?

A Yes. All this exhibit does is it shows a relationship between the amount of dollars that are eliminated from reimbursement considerations and the total inpatient dollars during that year. The year 1974. In 1974 what this exhibit says is that Mt. Sinai Hospital had costs in excess of the weighted average ceilings that we placed on ancillary and routine costs that were equal to 2.7 per cent of the total inpatient cost in that year, 1974.

THE COURT: 2.7 of its own --

THE WITNESS: Of the total inpatient costs at the facility, not related to Medicaid but total inpatient cost.

A Now, this cannot be comfortably related to an increase or a decrease in the rate because a rate can change because of the utilization in the facility, the number of patient-days, so you can't make a direct comparison, and all this does is show the relationship between the size of the disallowed costs resulting from the penalty and the total inpatient costs during that same period of time, which in this case is 1974.

Q I understand that.

Now, will you tie what you just said into the caption at the top of the page?

MR. IMBERMAN: He said it.

Q How does that penalty resulting from the 1974 rate affect the '76 rate?

A In determining the 1976 rate we start off with a basis of allowable costs. Those costs that are in excess of the average, weighted averages that we are using, are included from allowable costs and trended to '76.

MR. FINE: I have no further questions.

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THE COURT: I would like to see the attorneys in the robing room, but I think this is all of the hearing for today and I hope at all.

Thank you very much.

(Witness excused.)

(In the robing room.)

MR. IMBERMAN: I would like to renew the application which Imade some time ago in chambers for a temporary restraining order in this case primarily because the time is going along. We are almost to August 1st. All of the new rates promulgated by the department are being fed into computers all over the state. At least one hospital that I know of, the Genesee Hospital, one of the main plaintiffs in the case, has had its application for Medicaid payments by Erie County returned to it with a memorandum on it, and I am going to offer it in evidence -- I gave Mr. Fine a copy -- which in effect said that the controller of Erie County had received word of the new rates which were retroactive to January 1st and he was sending these bills back to Genesee Hospital saying, "Please submit them at different rates."

So that I am sure that this will be happening all over the state, and once these things get into the

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computers the hospitals are going to be very severely penalized because they will be cut back and this appeal procedure which Mr. McCann talks about is way down the road, and I sort of question a formula which says half the hospitasl in the state can apply for appeals if they think they don't have enough money.

We are dealing here with I think a flatly illegal situation. Everybody concedes there has been no HEW approval. I don't think the hospitals have to get involved in a dispute between Mr. Fine and Mr. O'Connor as to whether some sort of pattern was established between them.

The fact of the matter is here there has been no approval, I don't care what happened before, and the hospitals are being penalized by it, and the cases and tthe law are clear that regulations which do not have HEW approval which relate to the payment of inpatient costs are invalid, and if they are I think your Honor is obligated to say so and let the state go back to the approved plan and pay the hospitals on that basis, at least for the time being, until your Honor gets there. There is ample ground for a temporary restraining order.

Now, the alternative, of course, is what

jba39 196

your Honor suggests,and that is, as far as I am concerned, there is no further evidence that has to go in and I would be perfectly willing for your Honor to consider this as a hearing on the merits.

I don't think there is anything else.

MR.FINE: Your Honor, you have been very patient and I am not going to repeat the arguments respecting NEW approval.

It is perfectly true that the new rates are being implemented and it is perfectly true also that the impact on the hospitals is not that enormous as to warrant a temporary injunction.

We are talking,even in the case of the largest hospital, like the Mt. Sinai Hospital, of a comparatively minimal amount, considering the scope and size of the hospital operation. There is no irreparable damage being done them. The state fiscal crisis may be a matter which I need not estend upon, you are perfectly well aware of it.

The state has started to implement the new rates and I am sure will continue to do so.

If your Honor should grant a temporary injunction it would mean that these 83 hospitals would now be paid at their 1975 rates, which would mean an

jba40

outlay of money by the state and which would also mean that eventually if HEW approves the new regulation these hospitals will be compelled to refund the overpayment.

I submit to your Honor, and I think I need not extend on it, the considerations, the basic considerations, it seems to me, are that the hospitals in general, as Mr. McCann pointed out, very few of them are affected by the new regulation at all and --

THE COURT: There are two or three layers. One is if the case is handed to me as a matter for preliminary injunction as distinct from a TRO or as distinct from determination on its merits, then the question of irreparability of harm which you are raising is a significant one.

If, as sooner or later has to be the case, the matter is presented to me on the merits and if you take the same position that Mr. Imberman does, that as far as you are concerned the record, the evidentiary record, is complete here and it should be decided on the merits, then it seems the questions of irreparable harm are less significant than the questions of validity and invalidity, more so.

jba41

Let me ask first whether you agree with Mr. Imberman, whether from your point of view also the evidentiary record is complete and you would be satisfied to have the court --

MR. IMBERMAN: I am talking about the first cause of action relating to the inpatients.

THE COURT: All right. That's all we have been talking about.

MR. FINE: Your Honor, there is one other reason that is in my mind and I would be less than fair if I did not mention it to you.

I am hopeful that under the pressure of this very litigation both the State Department of Social Services and HEW will hasten their deliberations and act to get the approval that at this present moment is lacking.

THE COURT: I am sure the plaintiffs are too

What result would that have?

MR. FINE: It seems to me that that might mean that a determination on the merits, which I would frankly like to delay, to treat this as a plenary trial might give me the advantage, and I am speaking now in adversary terms, of being able to come to the court

jba42

and say, your Honor, that problem is now disposed of, HEW has approved the regulations retroactively, but from the point of view of the temporary injunctions -- and I would like to keep this case at that layer --

THE COURT: Mr. Fine, I think the matter is too serious for us to worry about who makes what particular advantage, and I am- sure you are not personally anxious to take take advantage of the situation.

Mr. Imberman has said that he has presented all the testimony, or maybe there will be another exhibit or two, that he intends to prove or to submit, rather, in relation to the first cause of action.

So what I want to ask you is have you submitted all the testimony you want to?

MR. FINE: Yes.

THE COURT: Then I think it is my obligation to regard this matter as having been tried as to the first of action and to determine it as to the merits. In that regard,at least at the moment, my inclination is not to grant a temporary restraining order.

I at the very least want to review the arguments presented by Mr. Fine as to whether or not the relations are inconsistent and so forth. I

jba43

heard the argument today but I have not studied the regulations and I am certainly not going to grant a temporary restraining order at this moment.

It is fair to say, however, that I think that the argument in that regard favors the plaintiffs and I will give due consideration to what ought to be done under those circumstances.

Now, in relation to the question of relief which even in the determination on the merits, insofar as you asked for an injunction, raises the qus-tion of the court's discretion, I am not saying I won't grant an injunction if I find you prevail, but at least that remains a question of discretion theoretically.

Can I have a representation, or do I have a representation from the state that if the court finds that the state procedures are invalid and if the state is nevertheless not enjoined but later on is found to owe money to the hospitals, that it will not raise the Eleventh Amendment as a defense to any suit by the hospitals to secure that money?

MR. FINE: I think I can make that statement, your Honor.

THE COURT: All right. Thank you.

jba44

MR. IMBERMAN: There is only one other issue that might be involved, your Honor, which I think in fairness I should raise. We do have a class action. There has been no class certification.

THE COURT: Do you have any objection to a class certification?

MR. FINE: None at all.

THE COURT: All right. That is made.

There is one other point. Mr. Fine has moved to dismiss.

You haven't answered that.

MR. IMBERMAN: I will have a brief in your Honor's hands hopefully by the end of the day tomorrow and I have another affidavit, a reply affidavit to Mr. McCann's, which I will serve right now and give it to your clerk.

MR. O'CONNOR: With regard to the merits, we are about -- and I mean either today or tomorrow -- we are about to file a motion stating that with regard to the relief as to the federal defendant, that it is a discretionary decision, that the Secretary is in the process of making that discretionary decision, and therefore the relief should not be granted.

jba45

This is made as a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. The memorandum is being prepared and final touches are being made and will be served today or tomorrow.

THE COURT: All right. Thank you.

- -

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Seymour Budoff	116			
William F. McCann	135	158		

EXHIBIT INDEX

State Exhibit	Identification	In Evidence
B		96
Federal Exhibit		
E	120	122

Not opinion

mdmch

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

HOSPITAL ASSOCIATION OF NEW YORK STATE INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

v. 76 Civ. 2027

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education and Welfare,

Defendants.

----------x

Before: HON. MORRIS E. LASKER,

District Judge.

New York, New York
July 29, 1976 - 3:45 p.m.

APPEARANCES:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, Esqs.,
Attorneys for Plaintiffs,
By: JACOB IMBERMAN, Esq., of Counsel.

LOUIS J. LEFKOWITZ, Esq.,
Attorney General of the State of New York,
By: JESSE FINE, Esq.,
Assistant Attorney General.

ROBERT B. FISKE, JR., Esq.,
United States Attorney for the Southern District of New York,
By: JOHN M. O'CONNOR, Esq.,
Assistant United States Attorney.

-oOo-

(In chambers)

THE COURT: Since yesterday's session I have studied the statute and the regulations with particular reference to whether I find merit in the argument of the State that the statute, by which I refer to 42 USC, Section 1396a(a)(13)(D) and its subparts, is consistent with the applicable regulations in 45 CFR, and whether two of those regulations, namely, 45 CFR 250 and 45 CFR 205 are inconsistent with each other.

I have concluded that the inconsistencies which the State alleges are not inconsistencies, and will explain my reasons in due course in this discussion.

I have indicated that under the circumstances I feel obliged to grant injunctive relief which will have the effect of seeing to it that the plan does not go into effect without the approval required, as I see it, by the statute and the regulations, but to stay such an injunction for ten days to permit the State to appeal.

We are now discussing whether it is necessary, even under the Court's view of the matter, to enjoin the entire operation of the State amendments, or whether it would be appropriate to limit the injunctive relief to those hospitals which would receive less money under the State amendments than they did in 1975, or, more

accurately stated, receive money at a lower rate than they did in 1975.

Mr. Fine argues that the more limited relief should be granted, and I will be glad to let him make a statement for the record on that point.

MR. FINE: The basis for my position is this: that the request of the petitioners seems to be limited, as far as I can tell from the order to show cause seeking relief, for a preliminary injunction --

THE COURT: Would you tell us where you are reading from?

MR. FINE: Page 2 of the order to show cause signed by your Honor on July 16.

It says that a preliminary injunction to issue enjoining reimbursement at less than the 1975 Medicaid rate of any plaintiff or member of a class.

I submit this is the relief they sought. This is the thrust of our defense as to why -- we allege 84 -- I am not particularly concerned with whether there are in fact 83 or 91 hospitals -- Mr. Imberman claims it's 91 -- hospitals are receiving less than their 1975 rate.

I should recall to your Honor originally when this action started the plaintiffs' complaint was

all the hospitals were receiving 1975 rates. Quite obviously now a majority of the hospitals are not receiving 1975 rates; they are receiving greater than 1975 rates.

The action was changed completely in its scope when on July 1 the State announced the 1976 rates with respect to all but either 83 or 91, and the number is not, I think, at this point of time of consequence.

The State announced new rates which, in most cases, gave a higher increase to hospitals, or a higher rate of reimbursement.

I submit, therefore, that the plaintiffs' only request for relief is related to those hospitals getting less than their 1975 rates of reimbursement. That number is 83 or 91, and I think that your Honor's injunction against the State should be limited to those 83 or 91.

MR. IMBERMAN: If your Honor please, it seems to me clear that your Honor has decided that the law is plain with regard to the requirement that there be pre-implementation approval by the Secretary of HEW, and without that approval these regulations are not valid. That is the thrust of the entire case.

The second point that we argued was that

the regulations also are invalid because they don't produce reasonable costs.

I gather for the moment your Honor is only focusing on the first issue.

THE COURT: I am not only focusing on it, but I want to make it plain on the record that I have reached no conclusions whatever as to whether the amendments are providing a reasonable cost.

MR. IMBERMAN: Once your Honor has decided that the regulations are invalid, then it seems to me that the State must be prohibited from putting them into operation, whether it is 83 or 85 or 90 or 100.

What we are talking about is regulations which are invalid, and your Honor is saying the State may not inforce them.

It seems to me that that is the crux of the matter, that these regulations are invlaid, and the State may not enforce them, and the State must then proceed on the basis of what the State plan was as approved by HEW before these regulations were promulgated as of July 1.

MR. FINE: Yes, but even if that is so it does not follow that any of the hospitals, other than those receiving less than their 1975 rates, have yet

demonstrated irreparable damage to them.

MR. IMBERMAN: We have demonstrated irreparable damage by the affidavits and the proof of Mr. Ingram.

MR. FINE: But only with respect to those hospitals receiving less than 1975 rates.

MR. IMBERMAN: Not necessarily, because a hospital can have irreparable damage if it receives the same rate in 1976 that it did in 1975, when inflation has proceeded at 7 or 8 percent.

THE COURT: Mr. O'Connor, do you have anything to add?

MR. O'CONNOR: No.

THE COURT: Gentlemen, I am prepared to rule on that issue, which I think is probably the only issue that needs disposition before I make findings of fact and conclusions of law.

MR. FINE: May I make one further statement, your Honor?

If your Honor relegates the State to computing the rates under the preexisting formula, and assuming HEW does not within the next week, ten days, or two weeks, approve these regulations, the State will be faced with the practical problem of computing rates under the preexisting formula.

How long this will take, I cannot say. There are not only the voluntary hospitals, there are the proprietary hospitals, and it will take some time.

We will proceed to take an appeal to the Circuit Court, but I want to say, as a practical matter, the State will have the problem of recomputing the rates for 1976 ab initio.

MR. IMBERMAN: I have asked my expert that very question, and my people have seen the individual calculations sheets of the Department of Health for each hospital, and I have been told, if you just take out the ceiling limitations which flow from the two critical rates, the 10 percent for interns and the 100 percent average, a recomputation can be done in about ten minutes for each hospital.

THE COURT: I have no way of knowing which view is correct about that.

I can only say, Mr. Fine, if there is a problem which is presented, I will not expect the State to do anything more than its best done in good faith.

If I should be affirmed by the Court of Appeals and the matter is sent back to me, I will, of course, entertain any application the State puts before me for modification of the injunction so that the realities

of life can be taken into account.

I am making the following statement on the record, ladies and gentlemen, because of the importance of this case, the fact that I am not in a position to draft a written opinion since I will be away from the court commencing the end of this week for a short vacation, and I don't want to let that interfere with the disposition of what I consider to be a matter of considerable public importance.

I should say on the record, however, out of fairness to all of you and for the benefit of the Court of Appeals judges, if they read the transcript of this meeting, that voluminous papers have by now been filed in this case and approximately a full day of hearings has been held, and I think I do have a grasp of the facts sufficient to take the action I propose to take today.

In addition to that, the subject which I am acting on is really a pure question of law, and perhaps it could have been acted on even earlier except that it took time to crystallize that issue and for the Court to familiarize itself with relation to that issue to the subject at large.

Plaintiffs moved for a preliminary injunction and for permanent relief to the same effect to enjoin the

State from reimbursing any plaintiff or member of the class for services rendered on or after January 1, 1976, at an in-patient hospital Medicaid rate which is less than its 1975 rate, and although the order to show cause is cast in those somewhat limited terms, the complaint itself asks for broader relief, which I refer to what I consider the relevant paragraphs of the complaint, in regard to the question of whether or not the proposed amendments to the State's Medicaid plan, the actual amendments, are yet valid.

In particular, I refer to paragraph 4, which states the 1976 in-patient rates were calculated pursuant to several new regulations which have not been approved by the Secretary of the United States Department of Health, Education and Welfare as part of the plan government the New York State Medicaid program. Such approval is required under the Medicaid Act, it is alleged.

The next paragraph of the complaint which I consider to be relevant to this issue is paragraph 50, page 15, which states the calculation and payment of the class' 1976 Medicaid in-patient hospital reimbursement rates violates the supremacy clause of the United States Constitution, Article 6, because it was done in accordance

with regulations which have the effect of State law, and which are in conflict with the laws of the United States on the same subject, the conflict here being with 42 USC Section 1396a(a)(13)(d) and with the regulations which implement that statute.

Finally, the complaint says on this issue, in request for relief sub-clause (c) at the bottom of page 20: Wherefor plaintiffs pray that this Court issue an injunction ordering the State defendants and their successors, et cetera, to comply with all federal laws and regulations of the United States Department of Health, Education and Welfare applicable to the New York Medicaid program, including reimbursement on the basis of reasonable costs, so long as the State of New York continues to participate in the federal Medicaid program.

I may comment that it seems to me that the prayer for relief in sub-paragraph (c) is sufficiently broad to grant an injunction against the operation of the amendments not limited to those hospitals which necessarily are receiving less money today than they were last year.

For the purposes of simplicity, I will refer to this subject matter hereafter as the first cause of

action.

The State opposes on two grounds. It has moved to dismiss the complaint, and it has argued with regard to the federal statute and federal regulations that one of the regulations to be discussed hereafter is inconsistent with the statute and inconsistent with another of the regulations.

I will deal first with the State's motion to dismiss.

By Public Law 94-182, Section 111a, the United States Congress, which amended Title XIX of the Social Security Act, 42 USC, Section 1396, Congress required any state which received federal funds under the Medicaid plans to waive its immunity to suit under the Eleventh Amendment to the Constitution of the United States.

New York State did waive its immunity in writing, but by letter, which indicated that it protested, in effect, the requirement of waiving. There is no doubt in my mind that the State saved its right to challenge the validity of the waiver provisions of Public Law 94-182.

The State argues that it signed the waiver under what it describes as financial duress. That the

State was certainly in a position of financial difficulty there is no doubt, and I take judicial notice of that fact.

That the State did not willingly give up its Eleventh Amendment rights, if that word be used as a layman would use it, I will agree.

But that the State did not waive its rights legally, or that it was subject to a form of duress which would render its waiver ineffective, I do not agree and I do not find.

A principal authority which the State relied on to support its position that the waiver was not valid in law because not freely made was the concurring opinion of Mr. Justice Marshall in Employees v. Missouri Public Health Department, 411 U.S. 279.

In that case, employees of the State of Missouri brought suit for overtime pay claimed to be due them under the Fair Labor Standards Act. The District Court dismissed the case as being an unconsented action against the State, barred therefore by the Eleventh Amendment. The Court of Appeals affirmed. The Supreme Court held six to three that the Eleventh Amendment did apply because the Court couldn't discern any intent on Congress' part to deprive the State of its Eleventh

Amendment immunity.

Justice Marshall concurred in the decision but wrote a concurrence, as I see it, because he felt that the decision should have been based on the theory that the State did not waive its immunity and had not consented to federal suit. As he put it, at page 296, "To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case."

Applying Justice Marshall's remarks to the instant case, the State argues that since it had already for some years undertaken the obligations of the operation of a Medicaid plan, it was totally unrealistic to believe that it could discontinue the plan, and, therefore, it was under the kind of duress at the time that the waiver provision enacted by Congress occurred, and it did not waive its Eleventh Amendment immunity with any true consent, but under the gun of the deprivation of federal support.

While I agree with the State that its analysis is consistent with Justice Marshall's position,

I do not believe that Justice Marshall's position is the law, or at least the law as set forth in Employees v. Missouri Public Health Department.

To the contrary, Justice Douglas' opinion for the majority there makes it clear, at page 285, that the rationale of the case was based on the Court's inability to find that Congress had intended to "make it possible for a citizen of that state" -- that is, the employer's state in the case of Missouri Public Health Department -- "or another state to sue the state in the federal courts."

It seems to me that if, as Justice Douglas and the majority held, the determinative factor as to whether or not the State could be sued depended on whether Congress intended that they could be sued, it necessarily follows that the Court holds that Congress has the right to provide that a State may be sued under the circumstances both of the Missouri Public Health case and the case at hand.

There is no dispute that in the case at hand Congress has specifically provided that in order to secure the benefits of federal assistance the State must consent to be sued, and I think that disposes of the issue.

I come now to the discussion of whether the plaintiffs are correct that the amendments to the plan may not be put into effect without the prior approval of the federal Department of Health, Education and Welfare.

The crux of the State's disagreement with that proposition is to be found at pages 4 through 7 of its memorandum of law in opposition to application for a preliminary injunction, and is crystallized at pages 5 and 6.

As set forth on page 6, the State argues, "The thrust of our argument is this: that 45 CFR 250.39(a)(1) requiring approval in advance of implementation, is inconsistent with the statute 42 USC,Section 1396a(a)(13)(D), which simply requires approval, and with the other regulations cited above."

The other regulations cited above is found at page 5 of the brief answer, 45 CFR 205.5(b).

That regulation speaks in terms of an "approvable" amendment, and it is the argument of the State that the two regulations are inconsistent with each other and with the statute.

For the following reasons I disagree with the State's analysis:

First, the statute provides as follows:

"(a) A state plan for medical assistant must ...

"(13) provide ...

"(D) for payment of the reasonable cost of in-patient hospital services provided under the plan, as determined in accordance with methods and standards consistent with Section 1320(a)(1) of this Title, which shall be developed by the state and reviewed and approved by the Secretary."

I find no inconsistency whatsoever between the phrase "which shall be developed by the state and reviewed and approved by the Secretary," as set forth in the statute, and the phrase in CFR 250.30(a)(2), the language of which reads:

"(a) A state plan for medical assistance under Title XIX of the Social Security Act must ...

"(2) provide for payment of the reasonable cost of in-patient hospital services in accordance with methods and standards which shall be developed by the state and approved in advance of implementation by the Regional Commissioner ...."

I think it normal to construe the word "approved" to mean approval in advance, particularly in

subjects as complex as this, and particularly where the public welfare is involved, and particularly where the federal government, which is the approving agent, will be paying large sums of money in connection with the subject matter which is to be approved.

As to the alleged inconsistency between the material discussed so far and the remaining regulation referred to by the State, specifically CFR Section 205.5, which covers amendments to plans, and is applicable in the circumstances, I find no inconsistency for the following reasons:

The relevant language of Section 205.5 reads:

"(b) Federal financial participation. Except where otherwise provided, federal financial participation is available in the additional expenditures resulting from an amended provision of the state plan as of the first day of the calendar quarter in which an approvable amendment is submitted, or the date on which the amended provision becomes effect in the state, whichever is later."

The language of Subsection (b) does not seem to me to be inconsistent with the other regulation referred to above or with the statute because:

One, the subject matter, sa the title indicates, does not deal with when the amendments become effective, but rather with when the federal financial participation may be received.

Second, and perhaps more important, the clause starts with the words "except where otherwise provided," and it seems to me that language clearly includes the exception of the specific provisions of CFR 250.30 which have been discussed above.

Moreover, it appears to be the Department of HEW's construction of the statute and the regulations that prior approval by HEW is necessary before amendments to a state plan may become effective. I refer to the affidavit of Seymour L. Budoff, an authorized official of the department, filed in this action July 23, 1976.

Finally, I note that the issue has previously been litigated in the federal courts, in particular in the case known as New Jersey Hospital Association, et al., v. Anne Klein, Commissioner of Institutions of the State of New Jersey, a suit which, similar to the one at hand, was brought by hospitals furnishing services to Medicaid patients against the reimbursing state, alleging the ineffectiveness of amendments to the state plan, because, among other reasons, the amendments had not been approved

by the Department of Health, Education and Welfare.

In commenting on that issue, Judge Barlow of the District of New Jersey, in the case which is designated Civil Action No. 76-64, states at page 5:

"Contrary to the explicit requirements of 42 USC, Section 1396a(a)(13)(D) ... the State of New Jersey has adopted and implemented its ... ceiling rule before receiving the approval of the Secretary of Health, Education and Welfare. Pre-implementation approval also is clearly required by a HEW regulation, 45 CFR, Section 250.30. It would seem clear, then, that the implementation of the ... ceiling without prior HEW approval is not permissible under controlling federal law."

Indeed, Judge Barlow granted summary judgment exclusively, if I analyze the case correctly, on these grounds.

Because I believe the implementation of the amendment to the New York State plan would be invalid in the absence of HEW approval, which has not yet occurred, and because it seems to me that the plaintiffs have established that at least a significant number of members of the class would be damaged irreparably in the sense that their slender reserves of cash would be importantly

affected during the pendency of these proceedings, but, above all, because the law simply requires that the amendments must be approved, I believe that the plaintiffs are entitled to judgment on the first cause of action, and that an appropriate injunction should be granted in the circumstances.

I am prepared to stay the effect of that injunction for a period of ten days so that the State can appeal my ruling to the Court of Appeals, which I would expect them to do, considering the seriousness of the subject matter and its effect on the financial problems of the State.

Mr. Imberman reminds me that the State's answer contests the jurisdiction of the Court. I disagree with the State and find that the Court has jurisdiction under 28 USC 1331. It seems to me that the holding in the Catholic Medical Center and other Medicaid cases makes that clear.

I am unprepared to rule at this time as to whether jurisdiction lies under other federal statutes referred to in the complaint.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other non-profit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U. S. Department of Health, Education & Welfare,

Defendants.

U.S. DISTRICT COURT
FILED
JUL 30 1976
S. D. OF N.Y.

JUDGMENT

76 Civ. 2027

(Judge Lasker)

This action came on to be heard on Plaintiffs' amended complaint, the answer thereto of the Defendants' Philip L. Toia, Robert P. Whalen, Peter Goldmark and Hugh L. Carey ("State Defendants"), the answer to the complaint of the Defendant David Mathews sued herein as David Matthews, the motion and affidavits in support of and in opposition to Plaintiffs' motion for a preliminary injunction, and the State Defendants' motion to dismiss the amended complaint; and the Court having heard oral evidence in open court, and all parties hereto having consented to having the trial of the first cause of action on the merits advanced and

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consolidated with the hearing on Plaintiffs' application for a preliminary injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure; and the Court having determined that this action may be maintained as a Class action pursuant to Rule 23 of the Federal Rules of Civil Procedure; and the Court having made findings of fact and conclusions of law as part of its opinion dictated in chambers on July 29, 1976, which was transcribed by the Court Reporter; and it appearing to the Court that the State Defendants are committing acts, and are about to commit acts as set forth in Plaintiffs' amended complaint, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to Plaintiffs and the members of the Class as a result; and that Title XIX of the Social Security Act, 42 USC §1396 et seq. ("Medicaid Act") and the regulations thereunder require a state which receives federal funds under the federal Medicaid program to pay hospitals the reasonable cost of in-patient hospital services rendered to Medicaid patients in accordance with methods and standards developed by the State and approved in advance of implementation by the Secretary of Health, Education and Welfare ("Secretary") as part of the state's Plan for Medical Assistance; and that New York State is receiving federal funds under the federal Medicaid program; and that the State Defendants are implementing three regulations - 10 NYCRR §§86.14(b), 86.21(k) and 86.26 in the calculation of Medicaid reimbursement rates for in-patient hospital services rendered on and after January 1, 1976, and that none of these regulations have been approved by the Secretary as part of New York's State Plan for Medical

Assistance ("New York State Plan"); and that the implementation of these regulations has caused and will cause immediate and continuing irreparable injury, loss or damage to Plaintiffs and the members of the Class; and that the State Defendants will continue to implement these three regulations unless enjoined; therefore it is ORDERED AND ADJUDGED:

That so long as New York State participates in the federal Medicaid Program, the State Defendants and their successors, officers, agents, servants and employees are ordered to comply with ~~all federal laws and all rules and regulations of the Secretary applicable to the New York Medicaid program including~~ not to, the requirement of pre-implementation approval by the Secretary of any amendment to the New York State Plan affecting reimbursement for in-patient hospital services and the requirement that hospitals be reimbursed for such services in accordance with the New York State Plan approved by the Secretary pursuant to the Medicaid Act; and

That 10 NYCRR §§86.14(b), 86.21(k) and 86.26 and the in-patient Medicaid reimbursement rates promulgated thereunder for Plaintiffs and members of the Class are unlawful; and the State Defendants and their successors, officers, agents, servants and employees are permanently enjoined from applying or attempting to apply said regulations to in-patient hospital reimbursement rates for services rendered by Plaintiffs and members of the Class to Medicaid patients on or

limits Fed and Regulations have been approved by the Secretary

after January 1, 1976; and

That the State Defendants and their successors, officers, agents, servants and employees promptly recompute and pay reimbursement rates for in-patient Medicaid services rendered on and after January 1, 1976 in accordance with the approved New York State Plan and that until such recomputation and payment is complete that they continue to pay those hospitals ~~for whom the 1976 rates promulgated on July 1, 1976 are higher than their 1975 rates at the level of the higher rates, and that they pay those hospitals for whom the 1976 rates promulgated on July 1, 1976 are lower than their 1975 rates at the level of their December 31, 1975 rates.~~

The First Cause of Action is hereby severed.

No execution shall issue and no proceeding shall be taken to enforce this judgment until the expiration of 10 days after its entry.

Dated: New York, New York
July 30, 1976

Thomas C. Platt
UNITED STATES DISTRICT JUDGE

Plaintiffs and the members of the class will be notified by the State defendants of the rates promulgated on July 1, 1976

JUDGMENT ENTERED - 8/2/76
Raymond F. Burghardt
CLERK

☆ U.S. GOVERNMENT PRINTING OFFICE: 1974-[illegible]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
Washington, D. C. 20201

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TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO: REGIONAL COMMISSIONER
SOCIAL AND REHABILITATION SERVICE
DEPARTMENT OF HEALTH, EDUCATION, & WELFARE
REGION II

TRANSMITTAL NUMBER: 76-43
STATE: New York

PROGRAM IDENTIFICATION: XIX

TYPE OF PLAN MATERIAL (CHECK ONE)

- ☐ NEW STATE PLAN
- ☐ AMENDMENT TO BE CONSIDERED AS NEW PLAN
- ☒ AMENDMENT

PROPOSED EFFECTIVE DATE: July 28, 1976

COMPLETE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

FEDERAL REGULATION CITATION: 45 CFR 250.30

NUMBER OF THE PLAN SECTION OR ATTACHMENT: Attachment 4.19-A Pages 18, 20a

NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT: Attachment 4.19-A Page 18

SUBJECT OF AMENDMENT: Rate Setting - Part 86 of Commissioner of Health's Administrative Rules and Regulations

GOVERNOR'S REVIEW (CHECK ONE)

- ☐ GOVERNOR'S OFFICE REPORTED NO COMMENT
- ☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
- ☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL
- ☐ OTHER, AS SPECIFIED:

SIGNATURE OF STATE AGENCY OFFICIAL: Philip L. Toia (Hugh O'Neill)
TYPED NAME: Philip L. Toia
TITLE: Commissioner
DATE: August 2, 1976

RETURN TO:
NYS Department of Social Services
1450 Western Avenue
Albany, New York 12243

FOR REGIONAL OFFICE USE ONLY

DATE RECEIVED: 3 AUG 1976
DATE APPROVED: 8/13/76

PLAN APPROVED - ONE COPY ATTACHED

EFFECTIVE DATE OF APPROVED MATERIAL:

SIGNATURE OF REGIONAL OFFICIAL: Dennis J. Conroy for
TYPED NAME: William Toby
TITLE: Acting Regional Commissioner

REMARKS:

A-1-76 43

(1) requests for revisions in 1975 reimbursement rates for cost increases incurred prior to the effective date of this section;

(2) errors made in the rate computation process or in the submission by a medical facility which have been brought to the attention of the Commissioner within the time limits prescribed in Section 86.16;

(3) significant increases in the over-all operating costs of a medical facility resulting from the implementation of additional programs, staff or services specifically mandated for the facility by the Commissioner;

(4) significant increases in the over-all operating costs of a medical facility resulting from capital renovation, expansion, replacement or the inclusion of new programs, staff or services approved for the medical facility by the Commissioner;

(5) requests for waivers of any provisions of Part 86 for which waivers may be granted by the Commissioner as prescribed in specific sections;

(6) changes in the method of providing services which result in a lower over-all cost for the services provided;

(b) Any request for the prospective modification of a certified rate must be accompanied by financial, statistical and program evidence sufficient to demonstrate over-all fiscal impact.

(c) In view of the commissioner's responsibility for rates paid by government agencies and article IX-C corporations, and for revisions

(7) requests for relief from the ceiling provisions of section 86.14 of this part. For such relief, a medical facility must demonstrate that its range of approved services, patient mix, lengths of appropriate stays or other pertinent factors are direct causes for all or part of the costs in excess of the routine or ancillary ceilings. Such relief shall not result in a rate which exceeds that based on maximum reimbursable State standards, unless a waiver of such standards is granted by the commissioner.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK - 435 -

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other non-profit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients, Plaintiffs, - against - PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U. S. Department of Health, Education & Welfare, Defendants.	NOTICE OF APPEAL 76 Civ. 2027 (Judge Lasker)

S I R S:

PLEASE TAKE NOTICE that defendants Toia, Whalen, Goldmark and Carey hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment of the United States District Court for the Southern District of New York, dated July 30, 1976 and entered in the office of the Clerk of said District Court on August 2, 1976, which declared Regulations 10 NYCRR § 86.14(b), 86.21(k) and 86.26 and the rates for in-patient Medicaid care promulgated thereunder

EXHIBIT III

unlawful because they had not been approved by the defendant Matthews and from each and every part of said judgment.

Dated: New York, New York
August 4, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants Tola, Whalen,
Goldsmith and Carey
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By: _____
JESSE J. FINE
Assistant Attorney General

TO: PROSKAUER, ROSE, GOETZ &
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UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
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New York, N.Y. 10007
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Att.: Mr. O'Connor

EXHIBIT III

P. 2

mdb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOSPITAL ASSOCIATION OF NEW YORK STATE, et al., Plaintiffs, vs. PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al., Defendants.	70 Civ. 2027

New Yori, New York.
September 1, 1976 - 10:00 A.

Before:

HONORABLE MORRIS E. LASKER, District Judge.

APPEARANCES:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.,
Attorneys for plaintiffs
300 Park Avenue
New York, New York 10022
By: JACOB IMBERMAN, ESQ., of Counsel.
SUSAN ROSENFELD, ESQ.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York
Attorney for defendants
Two World Trade Center
New York, New York.
By: JESSE J. FINE, ESQ., Assistant Attorney General.

DAVID MATTHEWS, Secretary, U.S.Department of Health, Education and Welfare
By: ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York.
By: JOHN M. O'CONNOR, Assistant United States Attorn

ALSO PRESENT:

AMBROSE DONOVAN, New York State Department of Health

CARMINE SHANG, Counsel, New York State Department of Social Services

JONATHAN BRANDES, New York State Department of Social Services.

THE COURT: Gentlemen, I got your letters which confirmed what I had informally been advised when I was in town a couple of weeks ago, that the Department of Health has approved some of the changes made by the State -- which were made July 1, and in the light of that approval the Court of Appeals has remanded the matter to me, although I have received no remand from them yet.

MR. IMBERMAN: I don't think it was a remand.

THE COURT: Suggested to you gentlement, was it?

MR. IMBERMAN: If I may just say this, and then I would like to have Mr. Fine talk about it. During the course of the argument on Mr. Fine's motion for a stay and an expedited appeal, somehow the question about the effective date of these regulations came up, and Mr. Fine expressed the view that it was the State's position that the regulations were retroactive to January 1.

I expressed quite a bit of disagreement with his view, and Judge Van Graafeiland then suggested that before the Court of Appeals hear the appeal that perhaps the matter of this alleged retroactivity ought to be discussed with you and some sort of ruling received. It was as informal as all that.

MR. FINE: I think the timing is of interest. What happened was that my argument for an extension of your stay, or a stay pending appeal on expedited appeal came on before the Second Circuit on August 17 there.

On the night of August 16, I got word that the Department of HEW had approved two of the three regulations, and on the oral argument before the Court I noted that fact, that they had approved them the day before the argument.

I suggested that as far as the State was concerned we regarded this approval as retroactive to January 1 and I took the liberty of citing a passage from your opinion, to which Mr. Imberman vehemently objected as not being the correct construction.

Judge Van Graafeiland said we would not like to hear this appeal piecemeal. We think before the appeal is heard there should be a determination by District Judge Lasker of what is in effect the effective date of these

approvals.

The State takes the position they are effective as of the beginning of the year, when they were intended to be applied to the rate structure for 1976.

Mr. Imberman, of course, would take the opposite view.

THE COURT: Let me ask a question before we go further. There is a little bit of ambiguity in my mind as to whether we are talking of one of two or three things. Namely, whether we are talking about the retroactivity of the regulation as viewed by the State or the retroactivity of the approval by HEW as viewed by HEW, or whoever has to make a pronouncement.

MR. IMBERMAN: The answer to that, your Honor --

THE COURT: Or both.

MR. IMBERMAN: -- is very simple, because your Honor has already ruled --

THE COURT: Just a minute. Wait a minute. I don't think you can give the answer, because what I am really asking, Mr.Fine, is what is the position of the State.

MR. FINE: The position of the state is that the regulation should be -- the approval vitalizes these regulations as of January 1, 1976.

THE COURT: I suppose it is necessarily sumsumed in that the State regards its own regulations as being retroactive.

All right. That question as to the position of the State has been answered in my mind.

Naturally, I am prepared to do whatever the Court of Appeals believes should be done. What effect that will have on my previous decision, of course, would also, I suppose, have to be dealt with.

MR. O'CONNOR: Excuse me, your Honor. The Department of Health,Education & Welfare also has a position on this.

THE COURT: I assume so. Since the question relates to the effect of the approval, the very first thing that would occur to me would be to ask them what they would believe to be the effect of their approval.

MR. O'CONNOR: That is not retroactive that the effective date is the date of the approval. It doesn't go back and cover to any date prior to approval.

THE COURT: It is nice to sit around and say what is your position, and what is your position, but I am a Judge, and I have to decide on the basis of some kind of authority or argumentation, of course, and I don't expect that to be given at least in final form today,

although perhaps you are in a position to give it in less than final form.

I would like to arrange before we break up as to how we are going to dispose of this question. Suppose we talk about it now, Mr. Imberman.

MR. IMBERMAN: I would like to suggest to your Honor any careful consideration of the problem should indicate there can't be a question of retroactivity because your Honor has already ruled these regulations cannot be implemented without HEW approval.

What we are doing is operating until that date. The State of New York and the Hospitals have been operating under the State plan approved in 1974. It was only on August 16th that HEW announced the approval of two of the regulations. You heard Mr. O'Connor that the Government's position is that this is not retroactive. It seems to me it must follow that everything that hospitals did up to and including the 15th day of August was under the State plan that had last been approved in 1974.

It was only after August 16, when there was an amendment, that the State plan became amended on that day.

Your Honor has ruled until the approval they can't put these regulations into effect.

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I might add one other thing, your Honor. Despite what Mr. Fine says now, I don't think there is a single thing, any place in existence -- at least nothing that I have ever seen -- pursuant to which the Health Department, the State of New York, or the Department of Social Services, announced that these regulations were to be retroactive to January 1, 1976, and, indeed, something that I think ought to be made part of the record, when they filed these documents with HEW for approval they announced on the face of the cover sheet, "Proposed effective date not January 1, 1976."

THE COURT: I don't want to proceed in this meetingon the lopsided basis of hearing a full argument on the merits by you and a statement of position by the others.

The first thing I would like to hear is whether you wish to prosent your arguments in full today, and let me take it from there, or whether this meeting was intended to make arrangements for how to dispose of this issue.

I will say this, Mr.Fine, without attempting to reach a final conclusion on the question. I think that -- let me put it this way. It is the State's burden to prove that these regulations would have retroactive effect. It would be formal to assume they would have

prospective effect rather than retroactive effect. We should proceed accordingly.

MR. FINE: I am willing to assume that burden of convincing your Honor.

It seems to me that the question boils down to basically a question of law. I don't know if there are any factual issues about it. I mean such facts as the date of submission appear on the record.

THE COURT: It doesn't depend on the whim of the HEW people, it is a matter of law.

MR. FINE: I imagine your Honor would require from us memorandums or briefs setting forth our arguments. We have evolved a number of arguments to sustain our position.

THE COURT: I agree.

Without setting times at the moment, why don't we agree on this kind of arrangement. I think this is the sort of issue on which the briefs probably should respond to each other instead of coming in and leaving arguments made that have not been answered, so why don't you get your briefs in by X time, and we will decide in a moment when, and then Mr. Imberman and the Government, and then if there is anything you have to reply, you will have a brief time.

Then if I feel I need to hear from you personally I will call you in forthwith, but I will try to avoid that, for you and for me.

MR. IMBERMAN: I would like to suggest there are certain factual matters that we submit to your Honor either by way of stipulation or some other way.

For example, I think we should make some way a matter of record here,what Mr. O'Connor has said, the Government's position, etc.

THE COURT: If that is what you mean by facts, yes.

Mr.Fine has just shaken his head.

MR. IMBERMAN: I would like to have as part of the record the various State submissions to HEW. For example, you will notice the one I have handed to your Honor has a proposed effective date by the State of May 28.

This one has a proposed effective date of July 28, 1976.

They were approved by HEW in August.

These things, I think, should be part of the record because your Honor certainly should be able to take these statements by the State --

THE COURT: I agree with you, and certainly the

Court of Appeals would want to see them, too.

MR. IMBERMAN: I would like to get together with Mr.Fine and work it out by way of stipulation.

MR. FINE: These proposals were preceded to most extent by prior submissions which I don't have with me, but in effect transmitted substantially the same regulation.

THE COURT: I take it that Mr. Imberman will not cause you any problem any more than you will him with regard to what the facts are. Maybe you will want to make reservations on some of the stipulations as to the relevance.

MR.IMBERMAN: I would like to sit down when Mr. Fine has all the things he thinks are relevant and we will go over them to see what should or should not be part of the record. I assume we will be able to agree on that.

THE COURT: Even if you can't agree on the relevance of anything, you can agree that they are facts.

MR. IMBERMAN: That is the point.

Does your Honor want to take up a timetable?

THE COURT: Yes.

MR. FINE: You realize HEW has neither approved nor disapproved the third regulation.

THE COURT: Which are the ones they have, and which is the one that is not? Refresh my recollection.

MR. FINE: The one regulation they did not approve, you will recall t here was a regulation disallowing 10 per cent of the cost paid of the interns'and residents' wages and fringe benefits as a basis for inclusion in the rate structure.

The other two regulations they did approva.

THE COURT: The one of the 100 per cent average?

MR. FINE: Yes, and the other which has the prospective effect of excluding certain costs and computing the future rates.

THE COURT: Incidentally, I did my best to struggle through Judge Fine's opinion that was reported in the Law Journal yesterday. I take it, however, it has very little to do with this case.

MR. IMBERMAN: Nothing.

MR. FINE: That is right.

THE COURT: I did see something about costs in there.

MR. IMBERMAN: I have two other matters I would like to take up briefly, and I am glad the gentlemen fromAlbany are here.

I would greatly appreciate if we could get a

report as to the extent of the STate's compliance with your Honor's order, which was for a prompt recomputation of these rates.

We are now in September, and I just don't know what is going on, but I know the hospitals aren't being paid the way they are supposed to be paid as far as everything that comes to me. I was wondering if perhaps these gentlemen could tell us.

MR. FINE: I inquired yesterday. Commissioner McCann is on vacation and I spoke to Mr. Davidoff, who is his right-hand man, as you know.

They have a group of people working on recomputing the 1976 rate for the first six months based on the 195 formula. In other words, without regard to the new regulations.

They have been certainly affected by the fact that it is the summer and people have gone on vacation.

Also, despite Mr. Ingram's casual dismissal of the fact it could only take ten minutes per hospital, it is a much more complicated job than that.

THE COURT: You mean Mr. Imberman?

MR. IMBERMAN: Mr. Ingram is my expert.

MR. FINE: Taking each hospital one by one and recomputing the 1976 rate under the 1975 formula is a

much more complicated formula than Mr. Ingram, Mr. Imberman's expert, indicated.

Mr.Davidoff told me they have a whole group of people working on it. He believes it would be a matter of a couple of weeks. They are complying with your order to recomputee the rates.

From time to time Mr. Imberman has called me and told me that various local welfare districts were not paying the hospitals in accordance with the 1976 rates as promulgated on July 1, and I have taken that up in each individual case with either Commissioner McCann or Mr. Evans in his office, and I have been told necessary correctional instructions have been issued.

THE COURT: What are your referring to?

MR. FINE: The State operates through 14 welfare districts. The Vtate of New York is one welfare district, for instance.

There is a County welfare office, say Seneca County, I think that is the last one you complained to me about, it may not be the whole welfare district, but Seneca County, in any event, was not complying with your Honor's order, and it takes straightening out. It is a confusing situation for the State as well as the hospitals.

I have tried to oblige Mr. Imberman in every

respect on that.

MR. IMBERMAN: I appreciate that very much, but despite the fact that people go on vacations, the hospitals have to pay the people who work for them and meet their bills, so everything that can be done to move this along I would appreciate.

I hope you won't mind if the people from the Hospital Association talk to Mr.Davidoff to try to satisfy themselves as to what is going on.

MR. FINE: I appreciate it. All I do is act as a conduit for the complaint.

MR. IMBERMAN: More than a month has gone by.

Can the hospitals whose rates have been re-computed start to get paid under the proper rate or do they have to wait until all 300 hospitals get finished?

MR. FINE: I don't know.

MR. IMBERMAN: Perhaps some of these gentlemen would.

MR. FINE: I don't think so.

MR. IMBERMAN: Once a rate is recomputed it should be paid rather than wait.

MR. FINE: It has to go back to the Bureau of the Budget.

THE COURT: This is something I know nothing about.

MR. FINE: We will comply with Judge Lasker's order, but --

THE COURT: If there appears to be an indication, which there doesn't seem to be now, the State isn't proceeding in good faith or is idle or negligent, I will see what I can do.

MR. IMBERMAN: I will ask our people to communicate with the State authorities to see what they can work out.

One other thing, your Honor.

In view of the fact your Honor made it very clear that you were in your opinion reserving on the issue of reasonable costs, not ruling on that, now that we have had an approval of HEW of those two regulations, I intend to askyour Honor for permission to amend our complaint to in effect bring again before your Honor the issue of reasonable costs, because I do not believe --

THE COURT: Where do you need to amend it? Isn't it there anyway? Isn't it residually there from the last amended complaint? I never meant to indicate, and I didn't think I did, in my opinion, as you call it, which I guess it was, although it was oral, that I had done

anything but rule on the issue as to the necessity of approval by HEW.

MR. FINE: ON the issue of reasonableness -- what you are raising is the question of the reasonableness --

MR. IMBERMAN: Reasonable costs of compliance with the statute. Technically speaking, the reason I said I might want to amend is because a judgment was entered on the first cause of action and the judgment said that the first cause of action is severed.

THE COURT: Yes.

MR. IMBERMAN: Since reasonable costs was in that first cause of action, I was troubled technically. I felt I could do it either by filing another complaint and ask to have that referr ed to your Honor or --

THE COURT: If because of the peculiarities of the procedural history of this case it is necessary to amend the complaint, I think that the plaintiffs are entitled to do so. I don't think the State at any time believed that I ruled or intended to rule on the question of reasonable costs.

MR. FINE: That is right.

MR. IMBERMAN: Reasonable costs would have to be a matter on which I assume there would have to be hearings, discovery, and whatnot. This is something we

would have to get into on a factual basis.

THE COURT: I would feel quite uneasy on having to decide that question solely on the basis of the two or three precedents that have been cited to me.

MR. IMBERMAN: I think we really have to get into the facts on that.

MR. FINE: Do you intend to serve an amended complaint then?

MR. IMBERMAN: Yes. I take it you would have no objection.

MR. FINE: No.

MR.IMBERMAN: Mr. O'Connor?

MR. O'CONNOR: No, but it takes us longer than the ten days to respond.

MR. IMBERMAN: To date? It will be almost what it was before.

MR. O'CONNOR: From prior experience I don't think we can answer in ten days. If you can agree there will be an extension to 30 days or something like that, there will be no problem.

THE COURT: I see no reason in the posture of this case why even if the Government hadn't answered an amended complaint the parties couldn't proceed to the discovery that they know would be necessary, because I can't

imagine I wouldn't approve -- of course I am not approving a blanket amendment but if the amendment is solely for purpose of assuring the issue of reasonable costs remains in the case, I can't imagine what the Department of Justice would say that would lead me to disapprove such an amendment. I almost wonder whether it is not still in there, but maybe it isn't.

MR. O'CONNOR: I just wanted it as an alert.

THE COURT: I think it is well to state it on the record, but I don't see why it should hold things up.

MR. IMBERMAN: We will get a second amended complaint served promptly.

THE COURT: Let's talk about the timing of the next steps here.

Subject to your working out a stipulation as to the facts which can include disagreements about relevance, if there are any, I would think the first point is to determine when Mr.Fine's brief would be submitted.

I am not sure he needs to wait for the stipulation to be complete, but I suppose it would be better if it were complete, so how long do you want for the stipulation?

MR. FINE: Would your Honor give us a couple of weeks?

THE COURT: I will give you all the time you want. You are the one now under pressure.

MR. FINE: This is the 1st of September. I don't have a calendar in front of me --

THE COURT: Why don't we make it the 15th? Nobody seems to have been unfair about that kind of thing. I would rather have a target date not more than two weeks from now.

MR. IMBERMAN: Could we have until the 30th? I am going to take off a week in September, so if we could have until the 30th.

THE COURT: Yes. That would be for the Government, too, regardless of how many times they have to answer pleadings, I think they have to answer motions the same.

MR. IMBERMAN: I don't see there would be any problem with the stipulations.

THE COURT: I can't see any reason there should be.

I will get to work on it as soon as I get the material.

Let's just state this on the record.

If,Mr. Fine, you wish to respond or reply to the answering papers, let's say you will do it within a

week after receiving them.

MR. FINE: You are speaking of his brief, his memorandum of law?

THE COURT: Yes.

MR. FINE: All right.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

HOSPITAL ASSOCIATION OF NEW YORK STATE, et al.,

Plaintiffs,

- v s -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.

70 Civ. 2027

----------x

B e f o r e :

HON. MORRIS E. LASKER,

District Judge.

New York, New York
September 14, 1976 - 4:30 p.m.

A p p e a r a n c e s :

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.,
Attorneys for Plaintiffs,
300 Park Avenue,
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By: JACOB IMBERMAN, ESQ.,
SUSAN ROSENFELD, ESQ., of counsel.

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the State of New York,
Attorney for Defendants;
2 World Trade Center,
New York, New York;
By: JESSE J. FINE, ESQ.,
Assistant Attorney General.

Appearances: [continued:]

DAVID MATTHEWS,
Secretary U. S. Department of Health,
Education and Welfare;
By: ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York;
By: JOHN M. O'CONNOR, ESQ.,
Assistant United States Attorney.

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(In chambers)

MR. FINE: Judge, I would like to tell you what the present situation is with respect to the 1976 hospital Medicaid in-patient rates that are set up.

Pursuant to your order the Commissioner of Health has recomputed all of the rates to be paid to hospitals under the old Medicaid formula, that is the formula that was in effect as of 1975 before these new regulations were promulgated.

I understand as a result of a telephone conversation today that those rates are now being certified to the Director of the Budget.

For your information I will tell you that ever since the adoption of the Cost Control Act of 1969, which is New York State Act Public Health Law Section 2807, the Director -- the Commissioner of Health in the first instance computes the Medicaid rates and certifies them and they are approved by the Director of the Budget.

He is now transmitting the rates to the Director of the Budget.

In the session of the Legislature -- in the session of the Legislature just past, the Legislature altered the responsibility of the Director of the Budget with respect to the approval of rates and while the Director

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of the Budget is obviously, since he was a party to this litigation, bound by your determinations in this case, I don't think that anywheres in your determinations you attempted or even considered eliminating the discretion conferred on the Director of the Budget by Section 12 of Chapter 76 of the laws of 1976.

That requires the Director of the Budget, after the Commissioner of Health has certified the rates, to consider whether or not in effect the state can afford it.

The Director of the Budget may very well feel that the rates promulgated under the old formula are beyond the capacity of the state to meet. I would like to show you, if I may just for your information, Section 12of Chapter 76, which became law, I believe, around March 30th.

You can just glance through it. In substance it does what I say, which is, up to now the Director of the Budget has simply been required to approve the rates. In March the Legislature extended his approval so that he should consider the economic factors involved.

THE COURT: May I ask you a question, whether this section, which of course I haven't had a chance to familiarize myself with, applies to -- whether there

is no question that it applies to Medicaid.

MR. FINE: No question. It applies to Medicaid.

THE COURT: Regardless of what effect it has on the litigation, do you agree that it intends to apply to Medicaid? It reads as follows:

"Prior to the approval of rates of payment for hospitals exclusive of residential health care facility, and so on, made by government agencies, the State Director of Budget shall take into consideration,"and so on."

It occurred to me as I read it that the federal statute, of course, imposes a duty, as I see it, on the State Government, and there may be a question as to whether the State Legislature can legislate in any way inconsistent with the federal statute and that therefore it was possible that this might not have been meant to apply to Medicaid but might apply to some other types of services.

MR. FINE: I think it a fair statement, and I think upon reading the statute you will see that it clearly applies to Medicaid payments.

I have no idea at this moment what the Director of the Budget's action will be.

THE COURT: Let's assume it both ways.

MR. FINE: Assume that he says the state cannot afford these rates computed under the 1975 formula. Then

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he returns it to the Commissioner of Health to recompute the raise within the limits he sets. This is a new problem that has not been raised before.

Up to now I have been perfectly agreeable, the Director of the Budget has been a party to this litigation, he is bound by your decision which stands and says that the new regulations are invalid. But it does not follow that that abrogates his responsibility to determine whether rates computed under the old formula are still not in excess of the state's capacity to pay. That is item No. 1 I wanted to bring to your Honor's attention.

Item No. 2 I wanted to bring to your Honor's attention, and I want here to bitterly contest the --

THE COURT: Let's say vigorously.

MR. FINE: Vigorously, I beg your pardon, vigorously contest the insinuation, the explicit statement that the state has been laggard in computing these rates.

Your order I think was made around the 1st of August --

THE COURT: Let me just make one statement. I have no objection whatsoever to your making any statement you wish on the record. If you are concerned that you made that impression with me, you have not.

MR.FINE: All right, sir.

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THE COURT: That impression is an impression I have, if you feel that, I have not.

MR. FINE: The computation of the rates was not an easy matter. It also hit the Department of Health at a time when a good deal of the personnel was on vacation and we had all sorts of problems, but it has now been completed and it is now being certified and I should hear from the Director of the Budget within the next few days.

However, it occurred to me, and this is really why I wrote you a letter, that if in the event your Honor should hold that HEW's approval of August 16th of the two resolutions, which it has already approved -- parenthetically I will tell you what I told Mr. O'Connor and Mr. Imberman outside, I have heard that with a modification, HEW has indicated that it will approve the third regulation, the one dealing with interns and residents costs, eliminating some of the language in which dates are referred to.

THE COURT: I assume your position will be that when it is approved it is also to be retroactive.

MR. FINE: Yes. The reason I came to your Honor, wrote your Honor the letter yesterday, was this: Assuming that the new rates are promulgated, approved by the

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Director of Budget and are promulgated, the hospitals are paid retoractively for the period January 1st to, let's say, August 16th, when the new regulations were approved, then your Honor, or the Court of Appeals, if the case should reach the Court of Appeals, says these approvals are retroactive to the first of the year, which was the state's intention initially, and which we hope to be able to prove to your Honor by evidence, then the state has to say to the 300 or 400 hospitals throughout the state, we have overpaid you --

THE COURT: Right.

MR. FINE: Historically, the way to recoup those overpayments would be to say to the hospitals, well, each welfare district in paying you now will deduct the amount of the overpayment from your current months' check.

I have some litigation, your Honor, involving four hospitals, which were overpaid substantially in prior years by the -- for Medicaid. These are all hospitals located in the City of New York, and the City of New York is the local welfare district seeking in cooperation with the state to recoup these overpayments.

Without regard to the justice of the claims, without regard to the legal basis upon which the recoupment

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is sought, the city is met, the state is met with this statement by the hospitals, and we believe it to be true, "If you deduct this substantial amount from our over -- from our current payments to recoup your overpayments, you put us out of business."

In one case one large hospital owes us close to $900,000, owes the city $900,000, the state, and that hospital has literally said, "Unless we can work out some way by which you can give us some relief we are going to have to close our doors."

What I am urging on your Honor is this. we think we can make out a fairly good case for the complete retroactivity of these regulations. I'm sure that -- you were kind enough to give us some time, Mr. Brandies has been working on it, I worked on it partially on the weekend, he has been working on it over the weekend, and we will work on it today and tomorrow, we think we can make a good showing that these regulations should be deemed retroactive to the first of the year, and if so it would create financial chaosand impose a burden on the hospitals, you see, if hospitals act like most people they probably spend the money as they see it. If we came and said to Mt. Sinai Hospital, we have now determined that we have overpaid you half a million dollars, Mt. Sinai

might very well say well, you know, if you insist on deducting this from our next month's Medicaid check, or next couple of months Medicaid check, we will be bankrupt, out of business.

So I am asking respectfully that your Honor in effect change your order so that we are not required to pay the -- assuming the Director of the Budget goes along with the new revised rates, that we are not required to make payments under those new revised rates until your Honor has determined the issue of retroactivity.

I think that that is an issue which our brief is due on the 22nd and I think Mr. Imberman's brief is probably due as quickly thereafter as --

THE COURT: When is that?

MR. IMBERMAN: Two weeks after that.

THE COURT: About the 5th of October.

MR. FINE: I don't need a week to reply.

THE COURT: I will be going abroad for a meeting from the 10th to the 17th of October dealing with pretrial matters, but -- it will be about a month until I can get to it.

MR. FINE: Mr. Imberman still intends to serve an amended complaint --

MR. IMBERMAN: Within the next couple of days,

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your Honor.

MR. FINE: I haven't seen that, your Honor.

MR. IMBERMAN: It has nothing to do with retro-activity.

MR. FINE: I understand that. It will raise other issues which are probably germane to this case. At this point of time it seems to me to make good sense both from the hospitals'point of view as well as from the state's point of view to continue the present rate-paying structure -- I don't know of any hospital in the state that closed its doors as a result, they may be suffering a little bit, but I don't think they are suffering that acutely, and I just say that it doesn't make sense to put the hospitals and the state in the position of having then to recoup substantial amounts of money which may financially embarrass them.

THE COURT: Let me hear from Mr. Imberman on both the issues that you raised. Talk first about the question of the possibility of changing the order, because the issue that you raised about the Director of the Budget is an entirely new thing and I don't even know whether Mr. Imberman is prepared to comment on that. If he is, I would like to know what he thinks.

MR. IMBERMAN: I will therefore not discuss what

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Mr. Fine called item No. 1, and that is the Director of the Budget theoretical power to overrule your Honor's order on the basis of his determination the state can't afford it.

I would like to address myself to the subject matter of Mr. Fine's letter, and that is his desire that the State of New York not pay the hospitals the monies that your Honor has already decided it should receive while he pursues this will'o the wisp of retroactivity, which only came up after your Honor decided this part of the case, and despite the fact that the Department of Health, Education and Welfare specifically has held that these changes in the regulations aren't retroactive.

THE COURT: Specifically has held? They made a statement on the record, yes.

MR. IMBERMAN: Yes. It is also my understanding that the -- I am not accepting as factual Mr. Fine's statement that HEW is going to approve the other Regulation 86.21, but the change -- I want to point out to your Honor the change that he told me he thought they were making deals with the elimination of the time period during which that regulation is effective under the state's promulgation. The time period is January 1, 1976 to March of 1977. As I understand the thinking, HEW is taking that out because

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they don't want, under any circumstances, to have a change retroactive.

THE COURT: That may be so. I would like to hear Mr. O'Connor on that.

MR. IMBERMAN: What we have here now, talking about the substance of this thing, is a situation where the State of New York has deliberately delayed making these payments to the hospitals. This is now the 14th of September --

THE COURT: Does anybody know how much money we are talking about for this period?

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MR. IMBERMAN: I would guess we are talking about in the neighborhood of twenty to $25 million.

THE COURT: For the nine or ten month period.

MR. IMBERMAN: $20 million for a six month period. If you went to a nine month period it would be closer to $25 million. Am I correct, gentlemen?

MR. FINE: In that range. We have no way of knowing.

THE COURT: Whether ten or twenty million we are talking about a lot of money.

MR. IMBERMAN: Now the state doesn't want to pay the money and the point is that the hospitals --

THE COURT: I realize that.

MR. IMBERMAN: The hospitals are being deprived of the use of the money that your Honor said they are rightfully entitled to --

THE COURT: I never said that. I said that they were wrongfully -- it was wrongfully taken away, I will put it that way.

MR. IMBERMAN: It was wrongfully taken away from them.

I don't know whether your Honor is aware of the fact that the state never pays interest on this money.

THE COURT: I was wondering about that.

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MR. IMBERMAN: Not only doesn't it pay interes on the money but one of the regulations, which we haven't talked about now, but which we are going to attack in the second amended complaint, is a regulation which is in part 86, and it is 86.8F, and 86.8F says very simply that if the State of New York finds that a hospital has been overpaid on these Medicaid rates, the hospital has to pay the money back plus seven percent interest.

But if the state is under -- if the hospital is underpaid, there is no such payment of interest by the state. So what we have here is the State of New York holding on to monies which the hospitals are entitled to.

Let me call your Honor's attention to something else, that Mr. Fine doesn't talk about in his letter, there are really two kinds of payments that we are talking about. We are talking about the payments which the hospitals would be entitled to prior to August 16th when HEW approved the change in regulations.

Now, if it is not retroactive, and the hospitals are entitled to the hold rate from January 1, 1976 to August 16th, it is retroactive then you go back on the new rate to January 1st, but from August 16th on the hospitals are clearly entitled to the rate with the ceiling determined by the regulations which HEW approved, but without the ceiling

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on this ten percent for interns and residents.

THE COURT: Until they decide that.

MR. IMBERMAN: But why don't they pay the hospitals from August 16th on that rate?

THE COURT: I can't answer that.

MR. IMBERMAN: Mr. Fine ignores that point completely. Let me make a suggestion to your Honor --

THE COURT: Yes.

MR. IMBERMAN: We think the hospitals are entitled to the money now.

THE COURT: All the money?

MR. IMBERMAN: They are entitled to the money up until August 16th on the basis of the 1975 regulations. They have been paid substantially less than that. We think they should be paid the difference between the two rates now.

We will agree, the hospitals will agree that if your Honor should determine the retroactive issue against us, the State of New York can deduct that extra payment from every hospital on the next payment, because the difference in timeis going to be pretty small as far as I am concerned.

I think your Honor will decide this matter in October, you will have the briefs in, and it is not that

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terrible an issue, and we probably won't get paid until the middle of September or the end of September no matter what happens.

I am perfectly willing to agree that if we lose they can deduct the money on the next payment. But the hospitals need this money desparately.

THE COURT: That seems to me to be a double-ended argument, Mr. Imberman, not that I think it goes against you for that reason, but if they need it desparately, isn't that evidence of the very concern that Mr. Fine indicates?

MR. IMBERMAN: I am delighted that he has concern for the hospitals, but the fact of the matter is no matter which way you look at it the State of New York has been dragging its heels and not making these payments when they should be made.

THE COURT: Let's distinguish between the State of New York, perhaps, and I'm not endorsing Mr. Imberman's argument, deliberately adopting a policy that they are not going to pay out a nickel which they do not have to pay out, which is their prerogative, and they are doingit by legislation, and it is a problem which is one that the individuals concerned are proceeding in bad faith, which I do not find, but as I understand your position, it is --

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Mr. O'Connor, I would like to ask you this:

I know that at the last meeting you stated, when I asked you on the record, that it was the position of the Department that their approval was not -- did not have retroactive effect.

I do not know that I asked you what the basis of your statement was, or who said so or whether it was based in law or whether it was just that they did not mean to -- it was not their intention to approve retroactively.

What is the basis of it as you understand it, what is the source of it and what is the authority for it?

MR. O'CONNOR: This first came up specifically at the oral argument in the Court of Appeals.

THE COURT: I know that.

MR. O'CONNOR: Following that we preferred not to make any statement at that particular time, we talked about it outside among the other counsel. But since it came up, I checked with the regional counsel and came up with the position which we articulated two days later. We wanted to make sure we knew what we were talking about. In those two days -- when I say it is our position, what I am saying is there is no legal basis for this particular regulation to be retroactive.

Mr. Fine says that he is going to come up with

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a good argument. Frankly, I don't know what his argument is going to be. It is not a question of policy. It is a question of we just don't think under the regulations and the law as it stands that this regulation under the law can be retroactive.

And that is based, though I don't have the regulations with me, your Honor, it is based upon the two regulations that you specifically mentioned in your-- in the dictating of your decision in your chambers.

At the time we were talking about whether something was approvable. Or whether it had to have prior approval.

Based upon those same regulations and nothing contrary has come to my attention, based upon those regulations that are in the decision that are mentioned there, the decision of the Department of Health, Education and Welfare in the in-patient area has to be -- the decision to approve has to be prior to the implementation, so if the decision to approve has to be prior to the implementation, and then in this particular case -- when I say our position is, our legal argument is there is no legal way for it to be retroactive.

THE COURT: Without meaning to prejudge Mr. Fine's position, I say that I understand now what the position

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of the Department is, and that at least, I may as well say so openly, of course it is consistent with the rationale that I articulated --

MR. FINE: I am hoping to persuade your Honor from changing your mind.

THE COURT: I know that. The question is what to do about the other issue in its relationship.

MR. FINE: May I interrupt just one moment to say this?

Your Honor's order was signed either July 29th or August the 1st --

MR. IMBERMAN: It was submitted on July 30th. That's when it was signed.

MR. FINE: On July 30th. This is now September 14th. I submit that the claim made that the state has been dragging its feet -- I don't mean me personally, but state officials generally have been dragging their feet is obviously not so.

They have within the past six weeks, roughly, had to recompute all of these hospital rates. They have done so during a period when they were hit by vacations, when their forces were not large, when they were hit with a Labor Day weekend, and they did the job as quickly as they could.

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MR. IMBERMAN: Will the state pay interest?

MR. FINE: Of course not.

MR. IMBERMAN: Of course not. May I for the record address myself very briefly to Mr. Fine's first point?

THE COURT: I would like to comment on the Issue No. 2, if I may. That is the question of whether the state should make payments before my decision or await my decision.

The matter, it seems to me, is too significant for me to shoot from the hip just on the basis of your discussion this afternoon.

It is apparent that the state even as of this moment is not yet in a position to make payments so we have, I guess, several days at least --

MR. FINE: I think the director of the budget will act quickly.

THE COURT: I will be prepared to decide this issue next Monday or Tuesday. I invite all of you to submit to me letters setting forth your position and the other points that you may have overlooked today. Don't have briefs, you see, because it is not that complicated. It is a question of purely discretion, and I will give it my earnest attention as soon as I hear from you.

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I would like to have those letters no later than Monday noon.

On the question of the director of the budget.

MR. IMBERMAN: I think for the first time since this case has been before your Honor Mr. Fine has raised the point of the power of the director of the budget, in effect to nullify your Honor's ruling under the claim that the state can't afford it.

I had not known that Mr. Fine was going to make this argument today, and I'm not fully prepared to answer it, but I can say just speaking off on the basis of recollection -- of course the matter has come up in other context, but I think the argument is totally impermissible in this context.

The Medicaid statute, Social Security, says in effect that if a state wishes to be in the Medicaid plan, and to get contributions from the federal government, and it must create a state plan which provides for the payment of reasonable costs to the hospitals, and what Mr. Fine is in effect saying is the director of the budget can nullify that entire concept merely on his ipso dixit that the state can't afford it.

This I think is impermissible. Nor can he overrule your Honor's order by saying, I'm sorry Judge,

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the state can't afford it.

In the Catholic Medical Center case the Second Circuit had precisely that issue before it some five or six years ago because there there was a freeze at the time of Medicaid payments; the argument was made that the state couldn't afford to pay any more, the costs were rising too rapidly.

The Court of Appeals invited HEW's comments, and it did get the comments that the state was just wrong and the Court of Appeals in effect said that it is no answer -- I mean, if you want to be in the Medicaid plan and get the benefit of federal government financing, you have to pay reasonable costs to the hospitals. Of course, you can step out of the Medicaid plan if you so choose.

MR. FINE: For all I know, that may be the determination of the director of the budget.

MR. IMBERMAN: I doubt very much whether he has the power to make that judgment.

THE COURT: I won't rule. It was implied in the question that I put to Mr. Fine earlier today in the discussion at that time, it was implied -- I find it hard to understand how the state can legislate in what would appear on its face anyway to be in derrogation of what I understand to be the obligations of the state under

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the --

MR. FINE: If the state can't afford to pay what the new rates call for, what the director of the budget will say to the Commissioner of Health about them I don't know.

I am simply saying that he may say, we think that you are -- remember, these are projections, he may say we think your projections of costs are excessive.

THE COURT: I appreciate your bringing to our attention another possible obstacle that may arise during the course of the litigation --

MR. FINE: This didn't arise before because up to now we didn't have to deal with new rates.

THE COURT: If it was put before me on the basis of an argument by the Attorney General of the State that if the budget director turns this down that is sort of the end of it --

MR. FINE: I'm not saying that is the end of it.

THE COURT: Thank you for coming in.

(Time noted: 5:00 p.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY OF THE WITHIN PAPER RECEIVED
DEPARTMENT OF LAW
SEP 20 1976
NEW YORK CITY OFFICE
ATTORNEY GENERAL

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and F. DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

76 Civ. 2027

CLASS ACTION
SECOND AMENDED
COMPLAINT
(MEL)

Plaintiffs, by their attorneys Proskauer Rose Goetz & Mendelsohn, for their Second Amended Complaint, respectfully allege:

PRELIMINARY STATEMENT

1. This is a class action for preliminary and permanent injunctive relief and a declaratory judgment brought by the Hospital Association of New York State, Inc., ("HANYS"), located in Albany, New York; Misericordia Hospital Medical Center ("Misericordia"), located in New York City; Buffalo General Hospital ("Buffalo"), located in Buffalo, New York; The Genesee Hospital ("Genesee"), located in Rochester, New York and The Mount Sinai Hospital ("Mount

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Sinai"), located in New York City on behalf of themselves and the nonprofit voluntary and public hospital members of the Association rendering hospital services on or after January 1, 1976 to patients under the joint federal and state medical assistance program provided for under title XIX of the Social Security Act, 42 USC §1396 et seq. ("Medicaid Program"). These nonprofit hospitals comprise the Class herein.

2. On January 1, 1976, defendants Philip L. Toia, Robert P. Whalen, Peter Goldmark and Hugh L. Carey ("State Defendants") imposed a freeze on Medicaid hospital reimbursement rates in the State of New York. Under this freeze, the members of the Class were paid their 1975 Medicaid rates for the 1976 Medicaid services which they provided. The 1975 rates had been calculated by the State Defendants as reimbursement for the hospitals' 1975 reasonable costs. The general inflationary movement of the economy has caused an increase in the costs of providing hospital services so that these costs are substantially higher in 1976 than they were in 1975. Thus, these frozen 1976 rates, which represented reimbursement of 1975 reasonable costs, did not reimburse hospitals for their 1976 reasonable costs. Because the freeze has never been approved as part of the New York State Plan for Medical Assistance ("State Plan") by the Secretary of the United States Department of Health, Education and Welfare ("Secretary"), and because it precludes reimbursement of hospitals' reasonable costs, it violates title XIX of the Social Security Act, 42 USC§§1396-1396i ("Medicaid Act").

3. On July 1, 1976, the State Defendants ended the freeze and issued Medicaid hospital reimbursement rates.

These new 1976 rates were calculated on the basis of methods and standards which, like the freeze, had not been approved as part of the State Plan.

4. On August 16, 1976, the Secretary approved certain of the methods and standards used by the State Defendants in the calculation of the hospital reimbursement rates issued by the State Defendants on July 1, 1976. Like the freeze, these approved methods and standards deny hospitals reasonable cost reimbursement for services rendered Medicaid patients.

5. If the methodologies adopted by the State Defendants for the calculation of hospital reimbursement rates continue in effect, the ability of the New York hospitals to provide the quality health services now made available to all the people of this State will be destroyed. The ultimate result will be to frustrate rational health planning and development in New York and, in contravention of the Medicaid Act, limit the availability of hospital services to Medicaid patients.

6. By denying the hospitals reimbursement for the reasonable costs of providing necessary health and hospital services to Medicaid patients, the State Defendants have violated and will continue to violate the Medicaid Act and Regulations, Article VI of the United States Constitution, the Fourteenth Amendment to the United States Constitution, the New York Public Health Law, the New York State Executive Law, and the New York State Social Services Law. Defendant Mathews is in violation of the Medicaid Act and Regulations and the Fifth Amendment to the United States Constitution by failing to insure the State Defendants' compliance with

the Medicaid Act and Regulations, and by approving certain regulations adopted by the State Defendants in their calculation of Medicaid hospital reimbursement rates.

PLAINTIFFS

7. Plaintiff HANYS is a New York not-for-profit corporation composed of approximately 300 nonprofit voluntary and public hospitals and other health care institutions in this State. It is organized for the purpose of providing administrative and legal assistance to nonprofit hospitals in New York State. Its principal place of business is 15 Computer Drive West, Albany, New York.

8. Plaintiff Misericordia is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is 600 East 233rd Street, Bronx, New York.

9. Plaintiff Buffalo is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is 100 High Street, Buffalo, New York.

10. Plaintiff Genesee is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is 224 Alexander Street, Rochester, New York.

11. Plaintiff Mount Sinai is a nonprofit New York corporation which provides in-patient and out-patient hospital services to Medicaid-eligible patients. Its principal place of business is Fifth Avenue and 100th Street, New York, New York.

DEFENDANTS

12. Defendant Philip L. Toia or his predecessor in office is, and at all times relevant hereto was, the Commissioner or Executive Deputy Commissioner of Social Services of the State of New York ("Commissioner of Social Services"). The New York State Department of Social Services is the single state agency designated pursuant to the Medicaid Act and Regulations, the New York State Plan for Medical Assistance and the New York State Social Services Law to administer or supervise the administration of the medical assistance program under the Medicaid Act. In implementing the challenged reimbursement methodologies, defendant Toia acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

13. Defendant Robert P. Whalen is, and at all times relevant hereto was, the Commissioner of Health of the State of New York ("Commissioner of Health"). In implementing the challenged reimbursement methodologies, defendant Whalen has acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

14. Defendant Peter Goldmark is, and at all times relevant hereto was, the Director of the Budget of the State of New York ("Director"). In implementing the challenged reimbursement methodologies, defendant Goldmark has acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

15. Defendant Hugh L. Carey is, and at all times relevant hereto was, the Governor of the State of New York ("Governor") and as such vested with the executive power of the State. In implementing the challenged reimbursement methodologies, defendant Carey has acted, and is acting, under color of law of the State of New York and contrary to the Constitution and laws of the United States.

16. Defendant F. David Mathews is, and at all times relevant hereto was, the Secretary and/or Acting Secretary of the United States Department of Health, Education and Welfare and is the federal officer ultimately responsible for the lawful administration of the Medicaid Program.

JURISDICTION AND VENUE

17. This action arises under the Medicaid Act, 42 USC §§1396-1396i, and the regulations promulgated thereunder, 42 USC §1983; the Administrative Procedure Act, 5 USC §701 et seq.; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; the New York State Constitution; the New York State Public Health Law; the New York State Executive Law; and the New York State Social Services Law.

18. Jurisdiction is vested in this Court under 28 USC §§1331, 1343, 1361, 2201 and 2202, 42 USC §1396a(g) and principles of pendent jurisdiction. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

19. Venue lies in this District pursuant to 28 USC §1391.

CLASS ACTION ALLEGATIONS

20. Plaintiffs bring this action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all other nonprofit hospital members of HANYS rendering hospital services to Medicaid patients on or after January 1, 1976. The Class is so numerous that joinder of all members is impractical. Upon information and belief, there are approximately 275 hospitals in the Class. There are questions of law and fact common to the Class, including whether certain reimbursement methodologies applied to the calculation of hospital reimbursement rates that have been promulgated and implemented by the State Defendants, some of which have been approved by the Secretary, are in violation of the Medicaid Act and Regulations, Article VI of the United States Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, the New York State Constitution, the New York State Public Health Law, the New York State Executive Law and the New York State Social Services Law. Plaintiffs will fairly and adequately protect the interests of the Class. Defendants have acted and have refused to act on grounds generally applicable to the Class, thereby making injunctive and declaratory relief with respect to the Class appropriate.

STATEMENT OF FACTS

21. The United States provides funds to a state which is funding and administering, in accordance with law, a state plan approved by the Secretary for the provision of medical assistance to certain categories of low income and indigent persons. This joint federal-state program is

known as the Medicaid Program, and is governed by the Medicaid Act and Regulations promulgated thereunder.

22. Under the Medicaid Act and Regulations, the methodologies for the calculation of in-patient and out-patient Medicaid hospital reimbursement rates must be part of a state's approved state plan.

23. Under the Medicaid Act and Regulations, a state Medicaid plan must provide for payment to hospitals of the reasonable cost of in-patient hospital services rendered Medicaid patients in accordance with methods and standards developed by the state and approved in advance of implementation by the Secretary. Pursuant to the Medicaid Act and Regulations, changes cannot be made in these methods and standards without the prior approval of the Secretary. The Medicaid Regulations, 45 C.F.R. §250.30, further provide that the reasonable cost of in-patient hospital services shall be determined in accordance with the standards and principles for ascertaining reasonable cost under the Medicare Act, title XVIII of the Social Security Act, 42 USC §§1395-1395pp (with an exception not relevant hereto) or under an alternate method which has been approved in advance by the Secretary.

24. A reimbursement methodology for the determination of reasonable cost other than that provided for under Medicare must give "[a]ssurance of adequate participation of hospitals and availability of hospitals services of high quality to title XIX [Medicaid] recipients." 45 C.F.R. §250.30(a)(2)(ii)(d).

25. The New York State Social Services Law provides that the New York State Department of Social Services "shall submit a plan for medical assistance, as required by . . . [the Medicaid Act] to the federal department of health, education and welfare for approval pursuant to the provisions of such law and shall act as the single state agency to supervise the administration of the plan in this state." Social Services Law §363-a(1). New York State participates in the Medicaid program under a state plan, which was amended on August 16, 1976, and which was prepared by the New York State Department of Social Services.

26. The New York State Plan ("State Plan"), both before and after the August 16, 1976 amendments, states that

> "As a condition for receipt of Federal funds under title XIX of the Social Security Act, the New York State Department of Social Services . . . agrees to administer the program in accordance with the provisions of . . . [the] State plan, the requirements of title XIX of the Act, and all applicable Federal regulations and other official issuances of the Department."
> Preface to Section I.

27. On March 30, 1976, the Commissioner of Social Services executed an amendment to the State Plan pursuant to 42 USC §1396a(g) consenting to suits in federal court by or on behalf of providers of in-patient hospital services with respect to payment of reasonable costs of such services and waiving any immunity from such suits under the Eleventh Amendment to the United States Constitution or otherwise.

28. Pursuant to the Medicaid Act and Regulations, the State Plan includes in-patient and out-patient hospital services among the services which will be provided to eligible Medicaid patients.

29. The State Plan, both before and after the August 16, 1976 amendments, sets forth methodologies for the calculation of in-patient and out-patient Medicaid hospital reimbursement rates.

30. From January 1, 1976 through June 30, 1976, the State Defendants froze reimbursement rates for in-patient and out-patient hospital services rendered Medicaid patients at their 1975 levels. This freeze was never approved by the Secretary, and was in violation of the methodologies for the calculation of in-patient and out-patient hospital reimbursement rates contained in the State Plan both before and after the August 16, 1976 amendments.

31. On July 1, 1976, the State Defendants issued new in-patient and out-patient hospital reimbursement rates for Medicaid services rendered by members of the Class, purporting to cover the period January 1, 1976 through December 31, 1976. These in-patient and out-patient rates were calculated in accordance with certain new methods and standards which were not part of the pre-August 16, 1976 State Plan.

32. For more than one-third of the members of the Class, the July 1, 1976 in-patient rates are lower than the rates which the State Defendants calculated as reimbursement for these hospitals' 1975 reasonable costs. For the entire Class, the July 1, 1976 out-patient rates are either lower than or the same as the hospitals' 1975 out-patient rates. As a result of the inflation to which the entire economy has been subjected, the hospitals' reasonable cost of providing in-patient and out-patient hospital services to Medicaid patients has been, and is, greater in 1976 than it was in 1975.

Thus, paying a hospital in 1976 at a rate which is less than or the same as its 1975 rate necessarily results in the hospital receiving less than its reasonable cost.

33. On August 16, 1976, the Secretary approved certain, but not all of the changes in the methodologies for the reimbursement of in-patient and out-patient hospital services submitted by the State Defendants, and incorporated them into the State Plan. These approved changes, individually and in the aggregate, have altered the State Plan so greatly that it no longer provides for reasonable cost reimbursement for Medicaid hospital services. Several of these changes are contained in 10 NYCRR §§86.8(d), 86.8(f), 86.13(c), 86.14(b), 86.14(e), 86.15(b), 86.21(i), 86.21(k) and 86.31.

Ceilings

34. 10 NYCRR §§86.13(c), 86.14(b), 86.14(e) and 86.21(k) impose a series of arbitrary ceilings on the amount of reimbursement which will be paid a hospital for rendering Medicaid in-patient hospital services. 10 NYCRR §86.21(k) imposes an additional arbitrary ceiling on the amount of reimbursement which will be paid a hospital for rendering Medicaid in-patient and out-patient hospital services. 10 NYCRR §§86.13(c), 86.14(b), 86.14(e) and 86.21(k) exclude from a hospital's in-patient and out-patient reimbursement rates part of the reasonable cost incurred by it in treating Medicaid patients.

Disallowance of Equipment Costs

35. 10 NYCRR §86.15(b) excludes from in-patient and out-patient hospital reimbursement rates inflationary increases in certain costs, such as costs of equipment leases. The failure to include such cost increases denies the hospitals reimbursement for reasonable costs.

Disallowance of Governmental and Judicial Costs

36. 10 NYCRR §86.21(i) excludes from in-patient and out-patient hospital reimbursement rates certain reasonable costs, such as interest, incurred as a result of governmental or judicial action.

Overpayments

37. 10 NYCRR §§86.8(d) and 86.31 violate the basic requirement of due process by denying a hospital an adequate opportunity to contest a determination by the Commissioner of Health that an overpayment has been made to the hospital.

Interest

38. 10 NYCRR §§86.8(f) and 86.31 exclude from a hospital's in-patient and out-patient reimbursement rates reimbursement for a portion of the hospital's reasonable costs by deducting from these reimbursement rates an amount equal to 7% of any overpayments resulting from (a) a prior rate revision by the State Defendants or (b) a finding by the State Defendants that the hospital has terminated a service. In violation of due process, the hospital has no adequate opportunity to contest the imposition of this interest penalty. The State Plan as amended on August 16, 1976 does not provide for the imposition of interest on the State Defendants if they fail to adequately reimburse a hospital for its reasonable costs.

Penalties

39. 10 NYCRR §§86.8(f) and 86.31 exclude from a hospital's in-patient and out-patient reimbursement rates

reimbursement for a portion of the hospital's reasonable costs by deducting from these reimbursement rates penalties, imposed by the Commissioner of Health, if a finding is made that the hospital has incorrectly completed reports, failed to file required revisions thereof or terminated a service. In violation of due process, the hospital has no adequate opportunity to contest the imposition of thes. penalties. These regulations further violate due process since the conduct which they proscribe is only vaguely and generally described, and the Commissioner of Health has almost unlimited discretion as to the amount of penalty to be imposed under them.

Termination of Services

40. The operation of 10 NYCRR §86.31 will have the effect of requiring hospitals to continue providing in-patient and out-patient services for which they are not receiving reasonable cost reimbursement.

Inadequate Appeal System

41. The State Plan, as amended on August 16, 1976, does not provide for an adequate appeal system conforming to standards of due process under which hospitals can seek and obtain review and correction of in-patient and out-patient reimbursement rates which do not reimburse the hospitals for the reasonable cost of services rendered Medicaid patients or otherwise do not conform to law.

Disallowance of Interns and Residents Costs

42. The State Defendants have submitted to the Secretary for his approval a proposed amendment to the

State Plan which is contained in 10 NYCRR §86.26. This regulation would deny hospitals reimbursement for part of their reasonable costs by automatically disallowing 10% of the cost of salaries and fringe benefits for interns and residents from the calculation of in-patient and out-patient hospital reimbursement rates. The State Defendants have implemented this regulation in the calculation of 1976 reimbursement rates for members of the Class even though this regulation has not been approved by the Secretary.

43. Pursuant to §2803 of the New York Public Health Law, regulations governing the establishment of Medicaid in-patient and out-patient hospital reimbursement rates must be adopted by the New York State Hospital Review and Planning Council ("Council"), subject to the approval of the Commissioner of Health. The Council has refused to adopt 10 NYCRR §86.26.

44. Pursuant to §101-a of the New York State Executive Law, the Temporary President of the New York State Senate and the Speaker of the New York State Assembly must be given at least 21 days prior notice of the adoption of a New York State regulation before it can become effective. This requirement applies to all regulations except those relating to the organization or internal management of an agency or those that constitute emergency measures necessary for the preservation of the public health, safety or general welfare. The Temporary President of the New York State Senate and the Speaker of the New York State Assembly never received 21 days notice prior to the State Defendants' adoption of 10 NYCRR §86.26. This regulation does not relate to the organization or internal management of an agency,

of resulted in non-collectibility and that the process of

nor is 10 NYCRR §86.26 an emergency measure necessary for the preservation of the public health, safety or general welfare.

Retroactivity

45. In the calculation and payment of Medicaid in-patient and out-patient reimbursement rates, the State Defendants have applied and will continue applying, retroactively to January 1, 1976, the August 16, 1976 State Plan amendments and 10 NYCRR §86.26. These amendments were not part of the State Plan prior to August 16, 1976. The members of the Class relied on the reimbursement methodologies in the approved State Plan in effect from January 1 through August 15, 1976 when rendering these hospital services to Medicaid patients during this period. If the members of the Class are not reimbursed for these services in accordance with the State Plan in effect prior to August 16, 1976, they will be deprived of their property without due process of law and be denied reasonable cost reimbursement.

Out-Patient Rate Ceilings

46. Chapter 76 of the Laws of 1976 of the State of New York, adopted March 30, 1976, imposes a ceiling on the out-patient hospital reimbursement rates for Medicaid services rendered by members of the Class during the period January 1, 1976 through March 31, 1977. The ceiling imposed on a hospital's rate for this period is the hospital's approved 1975 Medicaid out-patient rate. This ceiling has never been approved by the Secretary as part of the State Plan and, in fact, has never even been submitted to him.

47. The 1975 Medicaid rates for out-patient hospital services were calculated in advance of 1975 on the basis of 1973 allowable costs for such services which were then adjusted to account for inflationary cost increases expected to occur prior to and during 1975. The reasonable cost to each of the members of the Class for the delivery of out-patient hospital services to Medicaid patients is greater in 1976 than it was in 1975, and is less than the maximum rate allowed under the Medicaid Act and Regulations, namely, the reasonable customary charge. Thus, using 1975 rates as ceilings on rates for reimbursing 1976 out-patient hospital services necessarily results in the members of the Class receiving less than their reasonable costs.

Medical Care Advisory Committee

48. The Medicaid Regulations, 45 C.F.R. §246.10 (a)(3) require that an approved state plan provide for a medical care advisory committee which "will have adequate opportunity for meaningful participation in policy development and program administration, including the furtherance of recipient participation in the program of the agency." The State Plan provides for a Medical Advisory Committee in accordance with 45 C.F.R. §246.10. Section 365-c(2) of the New York State Social Services Law provides that the Medical Advisory Committee "shall advise the commissioner [of Social Services] with respect to [Medicaid] health and medical care services" and requires that the Committee meet at least once a year. The Medical Advisory Committee has not met within the past year, and was not consulted about the adoption or implementation of the August 16, 1976 amendments to the State Plan, 10 NYCRR §86.26, or the ceiling on out-patient rates.

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Obligation to Provide Services

49. The New York Public Health Law requires hospitals in New York State to provide certain in-patient and out-patient hospital services. Pursuant to this statute, the members of the Class are obligated to provide certain hospital services to Medicaid-eligible patients. As a result of the August 16, 1976 amendments to the State Plan, 10 NYCRR §86.26, and the outpatient rate ceilings, the members of the Class will be reimbursed less than the reasonable cost of providing these services which they are required by law to furnish.

Availability of Services

50. Pursuant to the Medicaid Act and Regulations and the State Plan, in-patient and out-patient hospital services are supposed to be made available under the Medicaid Program to all Medicaid-eligible patients. As a result of the August 16, 1976 amendments to the State Plan, 10 NYCRR §86.26 and the out-patient rate ceilings, many of these patients will be unable to obtain these hospital services because of the adverse financial impact of these regulations on the members of the Class. For example, at least 169 of the hospitals have been adversely affected by 10 NYCRR §86.14(b) and at least 103 by 10 NYCRR §86.26.

51. Under the Medicaid Regulations, 45 C.F.R. §250.30(a)(6), a state plan must provide for rates

> "which are designed to enlist participation of a sufficient number of providers of services in the [Medicaid] program so that eligible persons can receive the medical care and services included in the plan at least to the extent these are available to the general population."

At present, the out-patient departments of the members of the Class are the only source of the medical care and services provided for in the State Plan for a substantial number of Medicaid-eligible persons. If the use of the 1975 rate ceilings on 1976 Medicaid out-patient hospital reimbursement rates continues, many of these patients will be unable to obtain these services from members of the Class, with the result that these services will not be available to these patients to the extent they are available to the general population.

STATUTORY CLAIMS

52. The State Defendants have violated and continue to violate the Medicaid Act and Regulations and the State Plan in effect both before and after August 16, 1976 by applying methods and standards in the calculation and payment of reimbursement rates for in-patient and out-patient hospital services rendered Medicaid patients in 1976 that were not in the approved State Plan in effect at the time the services were rendered.

53. The methods and standards used by the State Defendants in the calculation of the 1976 Medicaid in-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, and 10 NYCRR §86.26, violate the Medicaid Act and Regulations, the New York Public Health Law and the New York Social Services Law because they arbitrarily deny hospitals the reimbursement of the reasonable cost of in-patient hospital services rendered Medicaid patients.

54. The methods and standards used by the State Defendants in the calculation of the 1976 Medicaid out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, and 10 NYCRR §86.26, violate the New York Public Health Law because they arbitrarily deny hospitals the reimbursement of the reasonable cost of out-patient hospital services rendered Medicaid patients.

55. The methods and standards used by the State Defendants in the calculation of 1976 Medicaid in-patient and out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, 10 NYCRR §86.26, and the out-patient rate ceilings imposed by Chapter 76 of the Laws of 1976 of the State of New York, violate the Medicaid Act and Regulations since they will result in the availability of in-patient and out-patient hospital services to eligible patients being reduced below legally required levels.

56. The methods and standards used by the State Defendants in the calculation of 1976 Medicaid in-patient and out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, 10 NYCRR §86.26, and the out-patient rate ceilings imposed by Chapter 76 of the Laws of 1976 of the State of New York, violate the Medicaid Act and Regulations and the New York State Social Services Law in that they were adopted without prior consultation with the Medical Advisory Committee.

57. The implementation of 10 NYCRR §86.26 violates the New York State Public Health Law since this regulation has never been adopted by the Council.

58. The implementation of 10 NYCRR §86.26 violates the New York State Executive Law since due notice of this regulation has never been given to the Temporary President of the New York State Senate and the Speaker of the New York State Assembly.

CONSTITUTIONAL CLAIMS

59. The calculation and payment of the Class' 1976 Medicaid in-patient and out-patient hospital reimbursement rates violates the Supremacy Clause of the United States Constitution, Article VI, because this was done in accordance with a state law, and regulations which have the effect of state law, in conflict with the laws of the United States on the same subject.

60. The methods and standards used by the State Defendants in the calculation and payment of 1976 Medicaid in-patient and out-patient hospital reimbursement rates, including the State Plan as amended on August 16, 1976, 10 NYCRR §86.26, and the out-patient rate ceilings imposed by Chapter 76 of the Laws of 1976 of the State of New York, violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution insofar as they have the effect of depriving the members of the Class of reasonable cost reimbursement when they provide in-patient and out-patient hospital services to Medicaid patients.

61. The implementation of amendments to the State Plan violates Article I, Section 10 of the United States Constitution insofar as these amendments are retroactively applied to reduce reimbursement for in-patient or out patient

hospital services provided Medicaid patients prior to the date on which the amendments were approved by the Secretary. This is because the retroactive application of these amendments impairs contractual obligations between plaintiffs and the State of New York.

62. By imposing out-patient rate ceilings, Chapter 76 of the Laws of 1976 of the State of New York violates Article I, Section 10 of the United States Constitution because it impairs contractual obligations between plaintiffs and the State of New York.

63. The implementation of amendments to the State Plan violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution insofar as these amendments are retroactively applied to reduce reimbursement for hospital services provided Medicaid patients below the level that would have been paid the members of the Class under the State Plan in effect prior to the date on which these amendments were approved by the Secretary.

64. By imposing out-patient rate ceilings, Chapter 76 of the Laws of 1976 of the State of New York violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the New York State Constitution insofar as these ceilings are retroactively applied to reduce reimbursement for out-patient hospital services provided Medicaid patients below the level that would have been paid the members of the Class under the State Plan in effect prior to the enactment of Chapter 76.

65. The implementation of 10 NYCRR §86.26 violates the due process clause of the Fourteenth Amendment to the United States Constitution since this regulation has been adopted in violation of plaintiffs' procedural due process rights.

66. Plaintiffs have no adequate remedy at law.

67. The members of the Class have suffered and will continue to suffer irreparable injury unless they are reimbursed the reasonable cost of in-patient and out-patient hospital services rendered to Medicaid patients.

WHEREFORE, Plaintiffs pray:

(a) That this Court preliminarily enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from reimbursing any plaintiff or member of the Class for Medicaid services rendered on or after January 1, 1976 at an in-patient or out-patient hospital rate which is less than its 1975 rate;

(b) That this Court preliminarily and permanently enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from promulgating or applying any amendment to the State Plan which would authorize reimbursement for hospital services rendered Medicaid patients at less than reasonable cost;

(c) That this Court issue an injunction ordering the State Defendants and their successors, officers, agents, servants, employees and attorneys to comply with all federal laws and rules and regulations of the United States Department of Health, Education and Welfare applicable to the New York Medicaid Program, including reimbursement on the basis of reasonable cost, so long as the State of New York continues to participate in the federal Medicaid Program;

(d) That this Court declare and adjudge that the amendments to the State Plan approved by the Secretary on August 16, 1976 and 10 NYCRR §86.26 are unlawful;

(e) That this Court declare and adjudge that the imposition of rate ceilings on out-patient hospital reimbursement rates for services rendered Medicaid patients on or after January 1, 1976 by Chapter 76 of the Laws of 1976 of New York is unlawful;

(f) That this Court permanently enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from applying or attempting to apply the amendments to the State Plan approved by the Secretary on August 16, 1976 and 10 NYCRR §86.26 to any hospital reimbursement rate for services rendered Medicaid patients on or after January 1, 1976;

(g) That this Court permanently enjoin the State Defendants and their successors, officers, agents, servants, employees and attorneys from applying or attempting to apply the rate ceilings on out-patient hospital reimbursement rates for services rendered Medicaid patients on or after January 1, 1976 contained in Chapter 76 of the Laws of 1976 of New York;

(h) That this Court enjoin Defendant Mathews and his successors, officers, agents, servants, employees and attorneys from approving any amendment to the State Plan which would provide for the reimbursement of hospital services rendered Medicaid patients at less than reasonable cost and order him to revoke his August 16, 1976 approval of amendments to the State Plan; and

(i) That this Court order Defendant Mathews to exercise his authority and compel the State Defendants to comply with the Medicaid Act and Regulations.

AND, that Plaintiffs be awarded their costs and such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
September 17, 1976

PROSKAUER ROSE GOETZ & MENDELSOHN

By _____
Jacob Inberman
A Member of the Firm
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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9/28/76

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

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76 Civ. 2027

MEMORANDUM

APPEARANCES:

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LASKER, D.J.

On August 2, 1976, judgment of the court was entered declaring certain amendments to New York State's regulations governing the rates of reimbursement to voluntary hospitals for services rendered under the Medicaid Program to be invalid until approved by the Department of Health, Education and Welfare under 42 U.S.C. §1396 et seq. A stay was granted for purposes of appeal and the State appealed.

On the day prior to argument of the appeal, the Department of Health, Education and Welfare approved two of the three amending regulations which this court had theretofore declared invalid. The Department has not yet approved the third amendment. At argument before the Court of Appeals the State contended that the effect of the Department's approval of the two amendments was retroactive to January 1, 1976. The plaintiffs and the United States disagreed. Without deciding the appeal, the Court of Appeals remanded the matter to this court for a determination of the question of retroactivity. That matter is now pending before the court, returnable ~~September 29th~~ October 6, 1976.

The judgment of August 2, 1976 required:

> "That the State Defendants and their successors, officers, agents, servants and employees promptly recompute and pay reimbursement rates for in-patient Medicaid services rendered on and after January 1, 1976 in accordance with the approved New York State Plan and that until such recomputation

> and payment is complete that they continue to pay the plaintiffs and the members of the class the rates promulgated by the State defendants on July 1, 1976."

The State has advised the court that it has completed the computations necessary to enable it to make payments to the plaintiff hospitals in accordance with the quoted requirement of the judgment. However, the State now moves for a stay of those provisions of the judgment until determination by this court of the pending issue of retroactivity. The plaintiffs oppose the motion. The United States Government has expressed no view.

Plaintiffs argue that the probabilities are that they will succeed on the merits of the retroactivity issue; that they will suffer irreparable injury during the period of any stay; that no other interested persons will suffer substantial harm and that it is in the public interest that payments be made to the hospitals at the old (and generally higher) rate.

The State counters that it should not be required to make the higher payments (estimated to amount to between $20 and $45 million) until the question of retroactivity has been determined; that if the State prevails payments in excess will have to be recouped from the hospitals; that past recoupments on account of overpayments have in some cases caused serious financial burdens to hospitals

or resulted in non-collectibility and that the process of recoupment would impose the possibly unnecessary expense of recalculation and renotification on the State.

Without prejudging the issue of retroactivity which has not yet been fully submitted to the court, we have previously expressed on the record the view that the State has a heavy burden of proof to establish that HEW's approval is retroactive in effect. Not only is approval normally presumed to be prospective, but the controlling statute and regulations provide for prior approval of any amendment to a Medicaid Plan and we have earlier held that the regulations are without effect until approved. This is not the only factor favoring plaintiffs: they have already been deprived of payments to which they were entitled because of the State's acting under regulations which had not received HEW approval. Accordingly, if the waiting period pending the determination of the retroactivity were to be great it would be inequitable to grant the State's application for a stay. In the present situation, however, the waiting period in question is short. The final briefs of the parties relating to the question of retroactivity are due ~~September 29th~~ October 6, 1975. The court will determine the matter with dispatch. To require the State to institute payments on the 1975 rate basis today and to reverse that situation should the ruling on the question of retro-

activity favor the State on this motion or on appeal -- even if it be assumed that the likelihood of such a ruling may be doubted -- would produce chaotic backing and filling, and would impose the added expense of recalculation and renotification on the State which is not in a position to assume any unnecessary expense.

The grant of a stay is, therefore, appropriate subject, however, to a significant condition. Under State law monies owed by the State to the hospitals are payable without interest, while monies payable by the hospitals to the State must be paid with interest. While the State may be free to enact such legislation, nevertheless it would be inequitable in the circumstances of this case to accede to the State's request for a stay if the payment it may be called upon to make is without interest.

For the reasons stated above the State's application for a stay is granted on condition that as to any payments as to which the stay applies, such payments if hereafter required to be paid, shall be paid by the State to the plaintiff hospitals together with interest at the legal rate for the period from the date of the filing of this order to the date of payment.

It is so ordered.

Dated: New York, New York
September 28, 1976.

MORRIS E. LASKER

U.S.D.J.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

v. 76 Civ. 2027

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U. S. Dapartment of Health, Education & Welfare,

Defendants.

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Before: HON. MORRIS E. LASKER,

District Judge.

New York, New York
September 28, 1976 - 4:00 p.m.

APPEARANCES:

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ROBERT B. FISKE, JR., Esq.,
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Attorney for Department of Health, Education and Welfare.
By: JOHN O'CONNOR, Esq.,
Assistant United States Attorney.

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(In open court)

MR. IMBERMAN: If your Honor please, the last conference that we had on this matter was September 14, 1976, exactly two weeks ago today, and at that time Mr. Fine, in reporting to your Honor on the present situation as to the hospital Medicaid in-patients, said the following, and I quote from page 3:

"Pursuant to your order, the Commissioner of Health has recomputed all of the rates to be paid to hospitals under the old Medicaid formula, that is, the formula that was in effect as of 1975 before the new regulations were promulgated. I understand, as a result of a telephone conversation today that these rates are now being certified to the Director of the Budget."

THE COURT: I recall that.

MR. IMBERMAN: The other points he said, and I quote:

"He is now transmitting the rates to the Director of the Budget."

And somewhere on page 7, I believe he said that "The process of recomputation has been completed and it is now being certified, and I should hear from the director of the budget within the next few days."

As of 2:00 o'clock this afternoon, two weeks

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later, those rates had still not been certified by the Commissioner of Health, and have still not been delivered to the Director of the Budget.

As a result, the entire process by which the defendants are supposed to comply with the order which your Honor entered just two days shy of two months ago has not been complied with. This entire process has just stopped because, for some reason, despite the fact the rates are recomputed two weeks ago, according to Mr. Fine, the people in Albany refused to do what your Honor drected.

I have no way of knowing how to cope with this. I have never in the thirty-five years I've been practicing had a situation where the order of a federal court has been, in my view -- and I say this in all seriousness -- deliberately disobeyed by a state official,and I've asked your Honor for this conference in order to call this to your HOnor's attention, and I wish to call to your Honor's attention the fact that the hospitals are suffering badly as a result of this.

I have a letter here that I would like to show to your Honor, which Miss Rosenfeld from my office received from the Director of Finance of the Genesee Hospital in Rochester, which indicates, although there has

been no significant change in the hospital's volume of patients, Medicaid patients, its receipts for reimbursement for taking care of these patients in the month of September has been less than 10 percent of what it normally is, and I'm showing your Honor this letter and I've given copies when I came to both Mr. Fine and to Mr. O'Connor.

Now, when a hospital ordinarily receives $350,000 to $400,000 a month for taking care of Medicaid patients and, as of today, the 28th of September, there was no difference in the figures that are in that letter dated September 24, that hospital is going to have to close up shop or do something.

THE COURT: Without commenting on the merits of the point that you are making, I'm confused by the letter. I can see what figures it received. I don't see any figures for comparison.

MR. IMBERMAN: The figures show from January of this year to September, and it shows that in January, for example, the hospital received $425,000 and in February $480,000, and in September $25,000; and the letter says we have had no significant change.

I checked with the hospital this morning to see if they had gotten any funds and they said no. It's a desperate situation.

THE COURT: Assuming that this letter means, and that it could be proved -- of course, I don't know -- that in September the Genesse Hospital, whatever the unit of measurement is that it had in August, for example, when it received $284,000, it does seem very worrisome that it only received $25,000 in September. I don't know if we need to make an exhibit of this. I think the burden of its contents is on the record.

I'd like to see what Mr. Fine and Mr. Lefkowitz have to say.

MR. FINE: I would say were the statements made on September 14 --

MR. IMBERMAN: Yes.

MR. FINE: -- were too true as of my knowledge of that date.

THE COURT: When you say "true," do you mean that you believe they were -- that you now believe at that time they were the fact, or that you then believed in good faith they were?

MR. FINE: I believe in good faith they were the fact.

I have since learned there has been a delay in the transmittal of the certified rates to the Director of the Budget. I am also prepared to make the statement

as of this moment the Director of the Budget has those certified rates, and this is true as of 3:30 this afternoon when I left my office.

THE COURT: Could you tell us who it was that gave you this information?

MR. FINE: The information is from Mr. Donovan, Assistant Counsel of the Department of Health, who told me he had ordered the rates to be hand-delivered, certified by the Department of Health to the Director of the Budget, and now in possession of the Director of the Budget.

This conversation took place within the last half-hour.

THE COURT: As a result of the delay which apparently had existed, even though you believed in good faith two weeks ago --

MR. FINE: I have no explanation for the delay.

THE COURT: -- that these actions had already occurred, will the Budget Director be in a position at such time as I dispose of the issue of retroactivity to take action if he is ordered to take action, or will the Commissioner of Health, whoever is responsible to take action?

MR. IMBERMAN: The Director of the Budget is to approve the rates; that's what his function is to be.

THE COURT: What I'm trying to find out, unfortunate as the delay is and as disappointing, is to find the Attorney General, whether in good faith or not, is put in a position -- I'll say even in good faith, is put in a position by other offices of the State to represent to the Court that something has been done which has not been done. The question is whether the passage of time that has actually occurred is going to influence the situation or not.

In other words, it's one thing for me to be faced with passive or active negligence or disobedience. The order has no effect if it has no effect.

MR. FINE: I can offer, your Honor, because of continual conversation between myself and the Department of Health, to get these rates certified with the Director of the Budget -- I can offer at this moment no explanation other than that the Department of Health wanted to get some collaboration with the Department of Social Services which has to administer the rates, and they waited -- the cooperation of the Department of Social Services to transmit the rates, and they got that and transmitted the rates to the Director of the Budget.

I'd like to submit to your Honor the effect of the delay is two weeks.

When the Director of the Budget gets the rates -- he has been apprised of the situation orally, I know -- he knows all about it. As a matter of fact, Mr. Lewittes knows Mr. Goldmark is familiar with this --

THE COURT: I thought Mr. Goldmark originated the whole scheme.

MR. FINE: -- is familiar with the case, and how quickly he can act I don't know. It's one of those things. He has to locate the money.

MR. IMBERMAN: Well --

MR. FINE: Let me finish my statement.

He has to locate $20 million or $30 million, or whatever it will cost. He is also in the anomalous position to make a position because the question of activity is still up in the air.

The function of the Director of the Budget, I should like to explain to your Honor at this point, up to 1975 the public law statute simply says the Director of the Budget, after certification to him by the Commissioner of Health, shall approve the rates, or the rates should be approved by the Director of the Budget.

In 1976 his function was changed somewhat --

THE COURT: Legislatively.

MR. FINE: -- legislatively.

And I should like to call your Honor's attention to what he has to do now and what the statute now provides. I am referring to Chapter 76 of the law of 1976.

THE COURT: How bicentennial can you get?

MR. FINE: Yes.

Your Honor, I will read it, skipping the irrelevancies.

"Prior to the approval of rates of payment to hospitals, exclusive of residential health care facilities and out-patient and emergency services made by government agencies" -- that is to say by the Medicaid program -- "the State Director of the Budget shall take into consideration economic conditions within the state which effect the economic resources which meet the resources of government-funded medicals. If economic conditions are determined by such director to be likened to have a severe adverse effect on the ability of the state government to make such resources available to purchase field care at the proposed rate, the Director shall return the proposed rates to the Commissioner and direct him to revise the rates to comply with the

Director's findings." End of quotation.

In short, your Honor, what we have here is a problem. The Director of the Budget, if you hold these rates to be retroactive, will have to find the money within the State's limited financial resources at the time.

I want to also make the observation that the same Chapter 76, paragraph 12, and Chapter 2(b) provides for a hospital rate review board, so that any hospital which feels that its 1976 Medicaid rate is improper has an appellate board set up to hear appeal on the rate determinations.

THE COURT: I would like to talk about that in a moment, unless that is the end of your remarks.

MR. FINE: I also want to add, your Honor, the following fact: This case, as you know, started off as a challenge to what, for brevity's sake, I'll refer to as a freeze on the 1976 rates.

You remember back in May or June the initial complaint challenged the fact that the 1976 rates were frozen at the 1975 level. On July 1, the State promulgated new rates, and on July 16 we were served with the first amended complaint which challenged the new rates because they were computed under a formula which

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

included regulation which plaintiffs allege had not been approved by HEW.

THE COURT: That is only one of your complaints, the only one I ruled on.

MR. FINE: Right.

The HEW then approved those claims. On September 1 --

THE COURT: It is more accurate to say approved two of the three.

MR. FINE: Two.

On September 1, at a hearing here, they said they would send a second amended complaint. I and Mr. O'Connor said we had no objection. And your Honor, I think, granted permission.

Three weeks later they got around to serving that amended complaint which is not a greatly enlarged attack on not merely the approved regulation of HEW, but also on other aspects of the whole Part 86 formula.

I mention all these facts simply to say the issues have now grown infinitely more complex.

The State is now faced with an attack that is so broad on its whole methodology of computing the rate that the service of that complaint sort of put a stop to our thinking about how we could handle this whole

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situation.

This is, of course, no excuse, so to speak, for not complying with your Honor's order, which I assume my client will, but it gives us another dimension to the whole case. We are now confronted with -- let me refer to it as a broad attack on the whole Part 86 methodology.

Now, given these complexities, the State is in a position where it cannot figure what the Medicaid program is likely to end up costing. If your Honor should hold, despite HEW approval, the two regulations approved were unreasonable and revert to the 1975 formula for the portion of the year starting August 16, which is the date upon which HEW approved those two regulations, we are faced with another fiscal problem, and I think what is happening in Albany at this moment in time they are considering the entire overall picture.

If your Honor, for instance, determines ultimately on the merits that these regulations, despite HEW approval, are invalid, the State might have to reconsider its entire participation in this whole program. You know, I'm always amazed, the State's position is like that of a man who is induced to become a partner in a very expensive yacht. The federal government owns a

printing press, it prints money; the State does not.

My point is the program may grow too rich for the State's budget. I think this is --

THE COURT: I have recognized at the outset of this case, and I say this without even having looked at the second amended complaint, that the issues that were raised here, even if only relegated to the three questions, were very profound issues on both sides, and I was skeptical from the beginning, for my part, as to whether they could be determined on the merits simply on the very good papers that we have so far, and even the very good testimony that we have so far.

I am very conscious of the gravity of this case. Having said that, Mr. Fine, I don't know what more can be said by a federal judge.

My job will obviously be to call the shots as I see them and determine whether or not the State of New York is incompliance with the federal statute or not.

One of the comforting facts of my position is the everlasting knowledge that I can always be corrected if I'm wrong, but I don't mean to sound light-hearted by saying that. I do mean that I don't think that disaster will set in. I don't suppose because of your telling me of your deep concern about the bind the

State might be in if I rule adversely you are suggesting there is anything I can do about that.

MR. FINE: I wanted you to understand. Before I conclude, sir, may I make one comment on this letter?

Over the past several months, Miss Rosenfeld, Mr. Imberman's associate, has called me about one or two mixed-up situations where apparently the local districts or counties had gotten very confused as to what they should pay.

THE COURT: I'm not surprised.

MR. FINE: I made some attempt in all sincerity to straighten them out. As a matter of fact, Miss Rosenfeld called me about this Genesee Hospital matter. It's quite obvious something happened here; I'm not sure what.

MR. IMBERMAN: I agree.

MR. FINE: I mean it has nothing to do -- my point is the drop in their income could not possibly have anything to do with the recalculations of rate.

THE COURT: Let me say I wouldn't think so, either. All that I have heard about the variations in rates, and amateur as I am in this field, it seems to me highly unlikely that a drop from $250,000 to $25,000 can be caused (a) by the change in regulation, and (b) it

apmch

would seem the regulation would have been in effect in August, anyway.

MR. FINE: That's right. There is something that happened in Rochester County; I don't know what it is.

When you called me on this matter, I put a phone call in to Albany -- whose name escapes me -- and he volunteered to find out and report back to me, but he has not.

MR. IMBERMAN: I think I can say something in that regard, your Honor. I agree the drop here is not entirely due to the failure to pay the correct Medicaid rate. It's something much more serious than that, which is directly involved in this lawsuit, and that is the State has not been paying the money to the county, and the county doesn't have it, and the law requires that the State part of the Medicaid plan, it must see to it that the hospitals are reimbursed. It may appoint counties or cities to be the agents to pay out the money, but it's the State's responsibility.

THE COURT: Let me comment on that. Two things: First of all, I'm not in a position to comment on what responsibility the State has beyond what we have already discussed in detail up to this date and we have

not discussed the question you are now raising, although you may be entirely correct, and if you need relief on that and it is within my jurisdiction, you are certainly free to apply for it.

The second thing is my stay, which I announced at the outset of today's discussion, proceeded on the assumption that, tight as money might be for the hospital, nobody would go out of a business as a result of the stay for the limited period of time which I expect this will be in effect.

If, however, I have proceeded on a mistaken assumption in that regard, the plaintiffs are free at any time to ask for modification of the stay, and particularly with regard to a particular hospital in a desperate situation --

MR. FINE: Your Honor, I repeat, this is obviously nothing to do with the rate.

THE COURT: I already said it must be --

MR. FINE: Something has gone wrong.

THE COURT: -- if there is a deliberate --

MR. FINE: If this were true --

THE COURT: -- if the monies had not been paid because of either affirmative or negative actions in Albany which results in the money not being available to

the conduit agency, that is economically serious in terms of economic survival.

MR. IMBERMAN: I know it's not evident. All I know is the president says the State owes them $7 million for Medicaid payments and hasn't paid it.

Let me just go to one or two of the points that Mr. Fine has made, and he has made this point for the second time -- I think he made it on September 14 also -- that is, the Director of the Budget has the statutory power to consider the economic conditions in the State, and if he feels the rates are too high, he can in effect send them back to the Commissioner of Health and say "recompute these." That may be so far as the introstate officials are concerned. But Mr. Goldmark, the Director of the Budget, is a defendant in this case, and Mr. Goldmark is subject to your Honor's order, and, as I said two weeks ago, Mr. Goldmark cannot overrule your Honor's order because he says in his opinion the State does not have the money.

I think it boils down to something as simple as that.

THE COURT: I agree with you, and I find it hard to believe Mr. Fine intended to convey any other thought.

apmch

MR. FINE: I'm just saying -- wait a second. Let us spell this a little bit out.

Until January 1, 1976, the rates fixed under the 1975 or any prior year's statute required the approval of the Director of the Budget. In 1976, the legislature gave the Director of the Budget an additional requirement as a precedent to his approval; that additional precedent to his approval is an existing statutory requirement, and I can see no reason why he could not legitimately say to his Honor, "I have followed your directive. We have recomputed the rates. They have been certified to me. But I'm withholding my approval because the State can't afford that."

THE COURT: He may be against the order --

MR. FINE: He can say this to you, with all due respect, and without in any way intending --

THE COURT: Of course he can say it. If you think it has any legal significance, you are free to argue whatever legal significance it has.

On the basis of the present discussion, it seems to me the Court's responsibility, if it found his disapproval resulted in noncompliance with federal requirements, would be to order him to comply with federal requirements.

MR. IMBERMAN: That order is in existence.

THE COURT: Well, it is. The order with regard to recomputing and everything stands. The payments are stayed pending your motion.

MR. IMBERMAN: Your Honor, I am not sure what your Honor's opinion says. I want to make the record clear. Your July 30 order directed the defendant, including Mr. Goldmark, to promptly recompute and pay --

THE COURT: I quoted in this --

MR. IMBERMAN: In connection with your Honor's order, does your Honor's decision make it clear how soon the State has to indicate whether it is going to abide by this condition or not, that is, pay the interest or not?

THE COURT: No, it does not. The stay wouldn't go into effect unless --

MR. IMBERMAN: Unless they affirmatively agree.

THE COURT: I haven't said that, but I'll say it now. Let me say this: I said at the end of this memorandum, "It is so ordered," because I wanted dispositive language. However, after each of you study this; if you wish to submit any supplemental order, or

believe a supplemental order is appropriate or necessary to carry out the provisions of this determination, I would be glad to entertain such an order, and it is -- I do think there is no reason why the State shouldn't indicate by a very near date whether it will accept the conditions of the stay or not.

Frankly, it seems to me -- well, I won't say any more than that.

Can I ask the Attorney General's office how quickly you can let us know?

MR. FINE: Today is Tuesday.

THE COURT: That's right.

MR. FINE: I have to clear it with the people in Albany.

Would you give me until Friday?

THE COURT: Friday noon?

MR. FINE: Friday noon.

MR. IMBERMAN: That means you will inform the Court and me, I assume --

MR. FINE: Yes.

MR. IMBERMAN: -- whether the State accepts the conditions of Judge Lasker's determination?

MR. FINE: Yes.

May I make one comment? In view of the fact

Mr. Imberman complains about the Genesee Hospital, and in view of the fact I made a telephone call and did not get a reply and I want to make sure the falloff in payment in Genesee Hospital does not reflect any controversy about the rate-making procedure before your Honor but may be due to intrinsic purposes I have no knowledge of, I would like to inquire into this and inform your Honor and Mr. Imberman about this.

THE COURT: I would appreciate it.

MR. IMBERMAN: I would appreciate it.

THE COURT: If he finds it does not have to do with this or other litigation which he has mentioned, would you please make an application to a Supreme Court judge in Monroe County to force the State to pay the hospital? I would appreciate it greatly.

MR. IMBERMAN: All right, Judge.

THE COURT: I will give you copies of this after I have amended it. It's all right.

What now?

MR. IMBERMAN: Today is September 28.

THE COURT: When is your brief due?

MR. IMBERMAN: Our brief is due a week from tomorrow, which is October 6.

- - -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

----------X

10/8/76

ANSWER TO SECOND AMENDED COMPLAINT

76 Civ. 2027

(Judge Lasker)

The defendants Toia, Whalen, Goldmark and Carey (hereafter referred to as the State defendants) answering the second amended complaint (hereafter referred to as the second complaint) herein by their attorney Louis J. Lefkowitz respectfully:

1. Admit the allegations of paragraph 1 of the second complaint but have no knowledge or information sufficient to form a belief as to the truth of the allegations therein except those descriptive of the nature of the action.

2. Admit the allegations of the first two sentences of paragraph 2 of the second complaint but deny the allegations of the balance of the paragraph.

3. Admit the allegations of the first sentence of paragraph 3 of the second amended complaint but deny the allega-

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tions of the second sentence and assert that approval by the Department of Health, Education and Welfare (HEW) was not required.

4. Admit the allegation of the first sentence of paragraph 4 of the second complaint but deny the allegations of the second sentence thereof.

5. Deny knowledge or information sufficient to form a belief as to the truth of paragraphs 5, 7, 8, 9, 10 and 11 of the second complaint.

6. Deny the allegations of paragraphs 22, 40, 41, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 of the second complaint.

7, Admit the allegations of paragraphs 12, 13, 14, 15 and 16 but deny those portions of those paragraphs which allege the named officials acted or are acting contrary to the Constitution and laws of the United States.

8. Deny the allegations of paragraphs 17, 18 and 19 of the second complaint.

9. Admits the allegations of paragraphs 21, 24, 25, 26, 29, 33, 34, 35, 36, 37, 39, 40, 43, 44 and 45 except that the State defendants respectfully refer to the Statutes and Regulations therein referred to for a full and accurate statement of their text and the State defendants deny those portions of said paragraphs which allege the State statutes or regulations referred to were arbitrary or denied to the hospital the reasonable costs of furnishing services within the context of New York's prospective rate-setting methodology or that the Regulations referred to required HEW approval.

10. Admit the allegations of paragraph 27 of the second complaint but allege the State executed the consent referred to under protest.

11. Admit the allegations of paragraph 30 of the complaint but deny that said freeze violated any law, statute or regulation or required HEW approval.

12. Admit the allegations of paragraph 33 of the second complaint but deny that such changes have altered the State Plan that it no longer provides reasonable cost reimbursement within the context of New York's method of prospective rate setting.

13. Admit the allegations of paragraph 38 of the second complaint but deny that the hospitals have no adequate opportunity to contest the imposition of the penalty therein referred to.

14. Deny the allegations in paragraphs 43 and 44 that the Regulation 86.26 was not approved or submitted and assert that the Regulation was promulgated as an emergency measure pursuant to New York's Executive Law § 110a-(3).

15. Admit the allegations of paragraph 46 of the second complaint.

16. Admit the allegations of the first sentence of paragraph 47 of the second complaint but deny the allegations of the balance of the paragraph.

17. Admit the allegations of paragraph 48 of the second complaint and respectfully refer the Court to the Regulations and Section 365-c(2) of the New York State Social Services Law for the full text of the Regulations and Law.

18. Admit the allegations of paragraph 49 of the second complaint but deny that the plaintiffs will be reimbursed less than the reasonable cost of providing the services referred to therein within the context of New York's prospective reimbursement method.

19. Admit the allegations of paragraph 23 of the second complaint but deny those allegations of said paragraph which

allege that prior approval by HEW is required as respects changes in the State Plan.

20. Admit the allegations of paragraph 42 of the second complaint but deny that Regulation 10 NYC 36.26 would deny hospitals their reasonable costs. The Regulation was approved by HEW on or about October 4, 1976.

21. Admit the allegations of paragraph 32 of the second complaint except that they deny upon information and belief that the hospitals cost of providing services is greater in 1976 than in 1975 within the context of New York's prospective methodology.

AS AND FOR A FIRST SEPARATE AND AFFIRMATIVE DEFENSE, THE STATE DEFENDANTS ALLEGE:

22. Public Law No. 94-182, § 111, 42 U.S.C. § 1396a(g) referred to in paragraph 27 of the second complaint which require the States to consent to suit in Federal Court by providers of in-patient hospital services and to waive the immunity from such suit under Amendment XI to the Constitution of the United States is unconstitutional and beyond the power of the Congress to enact. The State of New York executed its consent under protest and by reason of the fact that failure to execute the consent would have cost the State upwards of $40,000,000 in Federal Funds. The State executed the consent but expressly reserved the question of the propriety of the demand for this waiver. See letter dated March 31, 1976 from defendant Toia to Commissioner Toby of the Department of Health, Education and Welfare attached hereto as Exhibit "A".

The State defendants assert that this Court has no jurisdiction under said Public Law 94-182, nor under any other of the statutes cited in paragraphs 17 and 18 of the Second Complaint.

Said Public Law No. 94-182, 42 U.S.C. § 1396a(g) § 111 is violative of the XI Amendment to the Constitution and of the equal protection of the laws provided for in the XIV Amendment to said Constitution.

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, THE STATE DEFENDANTS ALLEGE:

23. This action against the State defendants is an action against them as officials of the State of New York. The State has not by constitutional provision or statutory enactment -- consent to suit in the Federal Courts nor to a waiver of its sovereign immunity from suit in Federal Court. This Court is without jurisdiction.

AS A THIRD, SEPARATE DEFENSE, THE STATE DEFENDANTS ALLEGE:

24. By Chapter 76 of the Laws of New York of 1976, the Medicaid rate of payments to hospitals for out-patient services was set at 100% of the level of payment made in 1975. Chapter 76, § 11(2)(c). Said Chapter 76 is constitutional and not violative of the Social Security Act of Federal Regulations issued thereunder. The prayer for injunctive relief set forth in the second complaint would necessarily restrain and enjoin the operation of this statute by the State defendants. Such restraint may only be ordered by a district court of three judges. 28 U.S.C. § 2281, 2284.

The State defendants respectfully request that a three-judge district court be convened to adjudicate the issue.

AS A FOURTH SEPARATE DEFENSE, THE STATE DEFENDANT ALLEGE:

25. All of the State Defendants have their offices and principal places of business in the City of Albany, Albany

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County, New York within the Northern District of New York. The claims herein involved arose in that district. The proper venue of this action is in the Northern District of New York. 1391 U.S.C.(b).

WHEREFORE, the said State defendants ask judgment dismissing the Amended Complaint.

Dated: New York, New York
October 12, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3391
By:

JESSE J. FINE
Assistant Attorney General

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

1450 WESTERN AVENUE
ALBANY, NEW YORK 12243

PHILIP L. TOIA
EXECUTIVE DEPUTY
COMMISSIONER

March 31, 1976

Dear Bill:

Enclosed is the State Plan amendment demanded by you under penalty of fiscal sanctions in your Action Transmittal, SRS-AT-76-14(HSA) dated January 28, 1976. This submission is designed to facially comply with the requirements of Section 111, P.L. 94-182, December 31, 1975.

Please be advised, however, that there are serious questions being raised by this and other states as to the constitutionality of the requirements imposed by this statute. Accordingly, this submission should not be interpreted as an acquiescence by us of the legal appropriateness of this demand. Indeed, we expect such questions to be resolved in an appropriate legal forum in the near future.

Sincerely,

Philip L. Toia

Honorable William Toby
Acting Regional Commissioner
Social & Rehabilitation Service
Region II
Department of HEW
Federal Building
26 Federal Plaza
New York, New York 10007

EXHIBIT A-P.1

★ U.S. GOVERNMENT PRINTING OFFICE — 1974-603-313

TMENT OF HEALTH, EDUCATION, AND WELFARE
L AND REHABILITATION SERVICE
..., D. C. 20201

Submit 6 Copies

MAY 3 1976

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

GIONAL COMMISSIONER
OCIAL AND REHABILITATION SERVICE
PARTMENT OF HEALTH, EDUCATION, & WELFARE
EGION NY

TRANSMITTAL NUMBER: 76-8

STATE: New York

PROGRAM IDENTIFICATION: XIX

F PLAN MATERIAL (CHECK ONE)

EW STATE PLAN
MENDMENT TO BE CONSIDERED AS NEW PLAN
MENDMENT

PROPOSED EFFECTIVE DATE: January 1, 1976

ETE NEXT 4 BLOCKS IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

AL REGULATION CITATION: P.L. 94-182, Section 111

R OF THE PLAN SECTION OR ATTACHMENT: Revised page 24a-Title XIX Plan as required by SRS-AT-76-14

NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT: Page 24a

CT OF AMENDMENT: State Consent to Suit

NOR'S REVIEW (CHECK ONE)

GOVERNOR'S OFFICE REPORTED NO COMMENT

OTHER, AS SPECIFIED:

COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL

TURE OF STATE AGENCY OFFICIAL

Stephen Berger

Commissioner

March 30, 1976

TO:

NYS Department of Social Services
1450 Western Avenue
Albany, New York 12243

EXHIBIT A

FOR REGIONAL OFFICE USE ONLY

DATE RECEIVED: APR 1976

DATE APPROVED: MAY 1976

PLAN APPROVED -- ONE COPY ATTACHED

EFFECTIVE DATE OF APPROVED MATERIAL

SIGNATURE OF REGIONAL OFFICIAL

TYPED NAME: William Toby

TITLE: Acting Regional Commissioner

REMARKS

P. 1976 B

Revision: SRS-AT-76-14(MSA) - 34a -
January 28, 1976

State NEW YORK

Citation		
45 CFR 250.70 F.R. 40-38	4.27	Disclosure of Information on Providers of Health Care Services and Contractors.

The State agency has established procedures for disclosure of information on providers of services, contractors, carriers, intermediaries and State agencies. These procedures meet all requirements of 45 CFR 250.70.

P.L. 94-182 Sec. 111	4.28	State Consent to Suit

The State hereby consents to allow suit in Federal court by or on behalf of providers of inpatient hospital services with respect to payment of reasonable costs of such services, furnished for any period after June 30, 1975, pursuant to section 1902(a)(13)(D) of the Act. The State waives any immunity from such a suit under the eleventh amendment to the Constitution or otherwise.

EXHIBIT A
P. 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Entered in Docket

Entered in Diary for

FILED
OCT 29, 1976

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other non-profit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U. S. Department of Health, Education & Welfare,

Defendants.

JUDGMENT

76 Civ. 2027
(Judge Lasker)

Memorandum Oct 29 1976

The defendants Toia, Whalen, Goldmark and Carey (the State Defendants) having requested a stay of the judgment of this Court made July 30, 1976, entered August 2, 1976, until this Court's determination of the retroactive effect to January 1, 1976 of the approval of the Department of Health, Education & Welfare on August 16, 1976, of certain regulations relating to the reimbursement of the nonprofit hospitals which are members of the plaintiff class for services rendered under the Medicaid program;

And this matter having come on to be heard by this Court and all the parties having appeared by their respective counsel, and upon the opinion and order of this

Court dated September 28, 1976, it is further

ORDERED AND ADJUDGED, that the judgment of this Court dated July 30, 1976, entered August 2, 1976, requiring the State Defendants promptly to recompute and pay to the members of the plaintiff class reimbursement for Medicaid services calculated in accordance with the New York State Plan in effect prior to August 16, 1976, is stayed pending the determination by this Court of the retroactive effect of said approval by the Department of Health, Education & Welfare upon the express acceptance by the State Defendants by letter dated October 1, 1976 of the following condition - that as to any payments as to which the stay applies, such payments if hereafter required to be paid, shall be paid by the State Defendants to the members of the plaintiff class together with interest thereon at the legal rate in New York from September 28, 1976 to the date of payment.

Dated: New York, New York
October 15 1976

Lasker.

U. S. D. J.

Judgment Entered 10/29/76
Filed and Rec'd
Clerk

jqds

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

HOSPITAL ASSOCIATION OF THE STATE OF NEW YORK, et al.,

Plaintiffs,

-vs- 76 Civ. 2027

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants

----------x

B e f o r e:

HONORABLE MORRIS E. LASKER,
District Judge

New York, New York
November 4, 1976--2:00 p.m.

A P P E A R A N C E S:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.,
Attorneys for the Plaintiffs
BY: JACOB IMBERMAN, ESQ.,
STEVEN S. MILLER, ESQ.,
SUSAN ROSENFELD, ESQ., of Counsel

JOHN O'CONNOR, ESQ.,
Assistant U.S. Attorney for Defendant Matthews

JOEL LEWITTES, ESQ.,
Assistant Attorney General of the State of New York

jqds

B1 THE COURT: I suggested that we get together concerning Mr. O'Connor's letter of yesterday. I note that Mr. Imberman has asked the reporter to be present and I have no objection to that. I don't know that anything is going to take place that is going to be of significance except maybe questions that are raised by the letter.

I should tell you this: I am running into some calendar problems of my own in which the next result is that it would help me somewhat if this case could be postponed for a couple of weeks beyond the date that we have set for the present time. If that could be worked out for the parties as well, perhaps that would take care of Mr. O'Connor's problem and if it wouldn't I would have to hear why not.

We could commence on the 27th of December. We don't have a jury here and it's not a question of anybody going to jail at Christmastime.

MR. IMBERMAN: No problem.

THE COURT: Is that all right for you?

MR. LEWITTES: That is fine.

THE COURT: In the light of that, Mr. O'Connor, that would give you almost two months from now. I realize that you are surprised to be taken seriously as a defendant all of a sudden, but I guess if you are going to go ahead and approve what the state does -- and I haven't really

studied the amended complaint since I assume that is the basis of it. Since you approve what the state does, you are just as responsible as they are.

Of course, you are entitled to a reasonable amount of time to get ready for that but there are two points I make.

One is the actual amount of time that is now available. The second is that I would suppose the defense on those points would be essentially the same as the defense of the state and while you may differ, I suppose, as to how you approach the problems of reasonable cost or one thing or another, still you should be able, I think, to assist each other on those points.

So since we are here because you felt that you might not have enough time to get ready, do you think now that with the case off for two months and in the light of what I have just said, that you will be able to handle it and, if not, I would like to know why because I really would like to get the case going. I think it's a matter of sufficient public import that it ranks even with the interests of the federal government in its importance.

MR. O'CONNOR: Let me Just ask a preliminary question. With regard to the starting on the 27th of December is there another day that would be near to that that your

Honor could start? I was wondering if we could change it from that particular week to the next week. I planned to be away between that week and New Years.

THE COURT: I have a real problem. On the 3rd of January I am starting a very long, possibly 6-week criminal multi-defendant case. What about the week before the 27th? I would make an effort to see whether I could get the people who were going to go to trial on the 20th to go to trial on the 27th instead. That would give you one less week for preparation but I can't take care of all of your requirements.

MR. O'CONNOR: I was mainly interested in getting a clear picture of whether we are starting with a particular trail date and we are working from that and pushing everything back in light of that or whether the trial date could be changed somewhat depending upon the discovery. If we are going from the trial date as more or less a date certain and working back, I would try to fit in everything within that amount of time.

Just as an example, today is the 4th. If we served any interrogatories or some interrogatories that we wish to serve on the plaintiffs, say, by the 12th, which would give us one week, then the question arises as to how long the plaintiffs are going to have to respond. For example, if we serve them on the 12th would they be able to answer us

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by, say, December 3? That would be three weeks afterwards.

THE COURT: I suppose to some extent it depends on the nature of the interrogatories. But if they are the kind of material that in my guts I would expect them to be in this case, it would seem to me Mr. Imberman is fairly well primed to answer them. He has preapred a good deal of material for the original hearings and so on, which goes to the merits of the case. I had better let him speak for himself, however.

Why don't you tell us what the thrust of the interrogatories is going to be.

MR. O'CONNOR: Your Honor, one of the reasons that I wrote the letter and I needed the clarification and I felt I had to argue against a foreshortening of the time is that we are right now in the process of analyzing our position with regards to the various defenses that we would have available to us and that we wish to put forth. Though I met with them this morning with regard to this, we don't have an absolutely clear picture.

THE COURT: You mean with your clients?

MR. O'CONNOR: Yes.

THE COURT: I can understand that. But can you give us an idea of what the issues are on which interrogatories might be served? If you don't serve them, so much the

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better. At least you must have some idea of what they might be.

MR. O'CONNOR: I have an idea of what they might be. We would like to know some basis for the legal conclusions that the plaintiffs have, specifically what are they claiming. We would like to know what experts they intend to call at the trial and also what their testimony would be, the experts that is.

Another area delineating general areas, and I hope I am not limiting myself --

THE COURT: I am not trying to preclude you.

MR. O'CONNOR: We would be interested perhaps in serving interrogatories with regard to the plaintiffs' estimate of what they think their reasonable costs are and with regard to information on the specific hospitals as to the hospitals' estimates of their own costs.

THE COURT: Every one?

MR. O'CONNOR: No, not every one.

THE COURT: There I can see. The other things you mentioned, although Mr. Imberman has to be the judge of how long it would take to answer, it seems to me are capable of accomplishment within a relevantly limited period of time. If you are going to ask the hospitals to dig up a lot of figures, they won't have Mr. Imberman's assistance and they

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may or may not know how to do it quickly.

MR. O'CONNOR: That is exactly the situation I am in now. We know we want the former. We are analyzing our position as to whether or not we want to pick out individual hospitals and ask them how they figure their costs, what their methods are of controlling their costs, what variables go into their methods, what they have tried, if they have tried cost-cutting, and whether they have been successful or unsuccessful at cost-cutting.

I am just giving certain examples. I am not saying we are because we are analyzing, but if we do ask those types of questions it becomes a much more extensive discovery.

THE COURT: I am wondering with regard to those types of questions whether you aren't more likely to get meaningful responses by deposing responsible people within the hospital which could occur at the same time as preparation of answers on other matters.

B2 MR. IMBERMAN: I would just say this, your Honor: The state requires the hospitals to maintain and to file uniform financial reports and every hospital in the State of New York files these with the Department of Health. So it seems to me if Mr. O'Connor wants to know any detail about any hospital's cost for any year, it's freely available to him from his co-defendant.

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THE COURT: It's freely available from the plaintiffs too.

MR. IMBERMAN: That is basic.

THE COURT: It's not a question of whether he gets it from Mr. Lewittes or you. It's available.

MR. IMBERMAN: If he is insisting that he going to get it from me, he is going to get it, of course.

THE COURT: All right. There may be more than that too, although I am not trying to create complications. I can imagine that in connection with such undefined concepts as reasonable costs and so on that either party may want to get as precise as possible an interpretation of the material developed by the other and that may require, or certainly would be made more effective by getting the face-to-face testimony of a witness so that if you look at a document and you don't entirely understand it you can ask it or you can ask what this means or why they put this figure there instead of that figure and so on.

But if you were to do that, Mr. O'Connor -- and I don't know what number of hospitals you think you might want to inquire about, but if it was a reasonable number, and I think it would become oppresive after a while, it would seem to me that you can plan those depositions during the period that is alloted and that the plaintiffs could answer

your interrogatories in the meantime because the interrogatories or the first group that you talked about, while significant, are of a different character of information than the second.

MR. O'CONNOR: Agreed.

THE COURT: So I would think that it would be possible if it foreshortened the period to foreshorten it, and it would be in the interest of justice for this case to go forward not later than the 20th or 27th of December and I think the federal government is, relatively speaking, a bystander, although you have a financial stake in this too, but certainly the state has a significant interest in getting this matter determined once and for all and since we are in this kind of limbo situation, I think it's very important that it be decided.

Is there anything else anybody wants to say? I don't know. If I were sure I could get in touch with the lawyers who case is being tried on the 20th at the present time I would do so, but they are out of town, at least one of them is, and I am not sure I can.

All I can do is to undertake to have somebody call them and see what possibilities there are and let you know this afternoon or tomorrow whether it will be the 20th or 27th.

MR. IMBERMAN: I have just one minor matter to call to your Honor's attention. Interrogatories that we served basically called for an identification of documents and identification of persons who had something to do with making policy determinations in connection with those regulations and I asked Mr. Lewittes whether he would be good enough instead of just identifying the documents, to give me copies or make them available to me to save me a step in the discovery process. That is, I wouldn't have to serve a Rule 34 motion, and he said he would be willing to do that.

When I asked Mr. O'Connor whether he would do that, the best I could get from him as of five minutes before we came into your Honor's chambers was that he would let me know some time on or before November 15 whether he would give me the documents or just identify them in some way. That is really doing this the long way.

THE COURT: Let me find out what his reason is. It's obvious it would be helpful to you and he is not doing it to be obstructive.

MR. O'CONNOR: I will tell you quite frankly what the reason is, your Honor, and will abide by whatever the result is.

I found in my past dealings if I pick out a particular date, for example, if I say I am going to try to

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do something by tomorrow, what seems to me to be relatively informal date, then I get a series of phone calls on that particular date asking me what the answer was which is perfectly appropriate in light of the date.

I decided I would prefer to be judged by my actions rather than by my promises. So I have tried to keep my promises down and I go about my business and bring about the actions. If my actions fall short I would like to be brought up on it.

What I represented is without giving him a specific date, and I represent now I will go about giving him an answer as fast as I can, but I am trying to avoid promising a certain date and then getting into what I consider the unnecessary heat of, for example, I say I will try to get back to you tomorrow --

THE COURT: How much time do you need to be able to tell him whether you can give him the documents or just identify them?

MR. O'CONNOR: Today being Thursday --

THE COURT: What does it depend on?

MR. O'CONNOR: It depends on my talking to the people in HEW and saying, "It looks like there is no problem, is there any problem with this or isn't there." If they say there is no problem I can go forward.

On the other hand, if there is a problem that I am not astute enough to recognize right now, I haven't promised something that I can't deliver.

THE COURT: I am sorry, but we all have to face deadlines. Let's give you a reasonable time to be able to advise us whether there is any problem. What you are really saying, as far as you are concerned, is that it's all right, you just want to be sure whether your client has an objections to it.

MR. O'CONNOR: Yes, I want to take the analysis a little further and I don't want to promise too early.

MR. IMBERMAN: If you identify a document I have a perfect right to ask you to produce it.

MR. O'CONNOR: I am not arguing with you at all.

MR. IMBERMAN: In order to save time, give me the document rather than listing it on a sheet of paper.

THE COURT: If it's a matter of expense, you can ask the plaintiff to pay for it. Isn't there somebody at HEW you can call this afternoon if you want to clear your conscience or tomorrow to check as to whether there is any reason why you shouldn't supply documents?

MR. O'CONNOR: Suppose I pick out a date, what about Monday? The problem is that I don't have a secretary. If I call up somebody and there is a busy signal I have to

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hang up the phone and I can't stand around the whole day trying to dial somebody at HEW. It sounds a lot easier than it is, which is the practical answer.

THE COURT: Your problems may be somewhat greater than the rest of us, but we all have some of these problems. Let Mr. Imberman know by Monday if you can't let him have the documents and if you can furnish them as quickly as possible.

MR. IMBERMAN: Mr. Lewittes, will I get your documents this week?

B3 MR. LEWITTES: You will get my documents from the Department of Social Services tomorrow. I expect, as far as the Department of Health is concerned, that you will get it some time early next week. I have a feeling, as you look through them, that you will realize that most of the documents required and the identification will have to do with those asked for from the Department of Social Services. There will be an overlap.

In any event, as I said before, I hope by the early part of next week the Department of Health will satisfy you.

MR. IMBERMAN: What about a list of individuals?

MR. LEWITTES: Yes.

THE COURT: If there are any problems which any

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of you have, that is defense counsel, with your clients about sluggishness or negativism, please let me know, if necessary, and please let them know that I have expressed a view that this is a case of considerable public importance that must be decided fairly and that the Court will use its influence to see that that is done.

In that regard I should tell you that I have decided the question of retroactivity. My secretary has not had a chance to type my decision. I have decided against the state. I don't think there is any merit in the argument. I think our dear friend made a very good try on a difficult proposition and maybe the state will prove me wrong, but I have done that.

I don't know whether this needs to be on the record or whether it can be but I thought I should tell you that in case it might affect the posture of the case in any way. Frankly, I don't see why it should. Even if you appeal and go back to the Court of Appeals on the question of the original preliminary injunction, which is now only partial, of course because of the approval the trial could still go forward.

So I see no reason to arrange anything any differently from what we have just been discussing, but at least you know about it. And the memorandum will be out

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tomorrow or Monday.

MR.O'CONNOR: May I just say one thing. With regard to the agencies, I have written down your statements or a note of them but I would like to say that the problem that I run into is not sluggishness.

For example, somebody who is working on the interrogatories that plaintiffs have served were on vacation for a week with regard to the original date. The HEW people have to conduct their standard business that they do every day, their non-litigation business, and they are not always available. That is where the problems come in.

THE COURT: I know there are always problems, but what I meant is to indicate to them that this case is regarded as more important than some others.

MR.IMBERMAN: I assume you intend to do the same thing. As far as we can analyze the documents we get and the list of witnesses, I intend to talk to you about noticing depositions and I would like to do this in as informal a way as possible. I hope I can call you up and say it.

THE COURT: You might be well advised to put aside a certain amount of time for yourselves even though you don't know how to use it.

MR. IMBERMAN: I would be willing to be as flexible as possible. I would like to take the depositions and run

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them from day to day and move them ahead as fast as we can. I hope that nobody is going to stand on the fact that the rules say you have to have so much notice in advance, etc., etc.

MR. O'CONNOR: I think that is directed at me. I am not going to stand on that fact. Say the rules say 10 days. It's a difference between whether you are talking about 10 days or you say you want one day. There is a lot of space in between there.

THE COURT: Let's not meet problems before they arise, or maybe we should meet them before they arise, but let's not create problems that may not arise.

What I would suggest, in view of the fact that you are all busy lawyers with bonafide obstacles to the completion of a job of this kind would be two things: First of all, that we recognize that this case has priority over -- and I won't say any case in the world, but at least all but one case on my calendar to the extent I am free, by which I mean I have the Speedy Trial Act staring me in the face that I can't ignore.

Second, with regard to something like the question of depositions, I would think that you might want right now to put down two or three days in such and such a week to be devoted to depositions in this case in case the depositions

are necessary. If they are not, then that is that. You don't have to know who you are going to depose that day.

MR. IMBERMAN: That is a great idea.

Judge, Mr. O'Connor won't get his documents before November 15 but if I have Mr. Lewittes' I can start analyzing his documents and start deposing his people. We can move ahead that way.

THE COURT: Are you going to be present at every deposition?

MR. O'CONNOR: Right now I do want to be present.

THE COURT: All right.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. and which are reimbursed for Medicaid services rendered to hospital patients,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.
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U.S. Dist. Ct.
Filed Nov 9 1976
11:46 A.M.
S.D. of N.Y.

76 Civ. 2027

MEMORANDUM

#45348

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Assistant United States Attorney

LASKER, D.J.

On appeal from the grant of a preliminary injunction prohibiting defendants from implementing without prior HEW approval three new State regulations, 10 N.Y.C. R.R. §§86.21(k), 86.14(b), and 86.26, which govern aspects of State reimbursement to hospital participants in the Medicaid program, the Court of Appeals remanded for a determination of whether or not HEW's approval of two of the regulations subsequent to the grant of injunctive relief rendered them retroactively effective.[1/] The reasons which supported the earlier ruling that prior approval from HEW was required similarly compel a finding that approval of the regulations is prospective, not retroactive, in effect.

The State's principal contentions in support of the proposition that the regulation may be retroactively applied are substantially repetitious of its arguments on the question, earlier decided by the court, as to whether prior approval from HEW was required. We continue to believe that /the initial ruling was correct and should not be modified or reversed. Both the language of the statute, 42 U.S.C. §1396a(a)(13)(D) and of the regulations promulgated by the agency charged with administration of the medicaid program, 45 C.F.R. §250.30 (a)(2) (see Lewis v. Martin, 397 U.S. 552, 559 (1970)) require that these kinds of charges -- that is, those

going to the "methods and standards" for reimbursements of hospitals for inpatient services -- be approved by the Secretary prior to going into effect. See New Jersey Hospital Association v. Klein, Civ. No. 76-64 (D.N.J. April 9, 1976). Cf. Columbia Heights Mission House Hospital Inc. v. Weinberger, 380 F.Supp. 1066 (M.D.La. 1974).

It is suggested that because New York provides prospective rather than retrospective reimbursement of medicaid costs, prior HEW approval was unnecessary and retroactive application of HEW approval is appropriate: "Even if charges were unreasonable or confiscatory, prior approval of charges is not needed since the Plan a priori provides for a method of payment of costs." State Memorandum at 3. However, a hospital's ability to plan its procedures around reimbursement eligibility criteria (necessary to permit planning of the hospital budget) depends not on whether reimbursement is prospective or restrospective but on its knowledge before expenditures or other commitments are made of what the requirements for receiving State reimbursement are.

The State's argument that the hospitals were put on notice of the proposed changes is simply incorrect. Although it is true that the State advised the hospitals in the Fall of 1975 that its 1976 payments would be made on the basis of "interim" development of new rates, there was no notice

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that the State might attempt later in 1976 retroactively to change the rules under which the hospitals were operating in January, 1976. Indeed, when the State submitted the new regulations to HEW in the Spring of 1976, the State itself proposed an effective date of May 28, 1976 for regulations §§86.14(b) and 86.21(k) and of June 24, 1976 for regulation §86.26. Under these circumstances it is inconceivable that the hospitals can be charged with knowledge that the new regulations would be applied retroactively to January 1st. See St. Francis Memorial Hospital v. Weinberger, 413 F.Supp. 323 (N.D. Cal. 1976).

The State contends that retroactive effect must be given to the now-approved regulations because of 42 U.S.C. §1396a(a)(30) which requires a state plan to "provide ... methods and procedures relating to ... the payment for care and services available under the plan .... to assure that payments ... are not in excess of reasonable charges consistent with efficiency, economy and quality of care." It is argued that since the changes were approved, payments at the former rates -- to the extent that they were any higher -- would be "in excess of reasonable charges." However, the previous payment methods had also been approved by HEW and were presumably reasonable until such time as they were replaced. Moreover, as indicated above, it would be inconsistent at least with "efficiency," and

"quality of care" to change the rules for reimbursable expenses after an expenditure period has ended.

We conclude that the regulations which were the subject of the preliminary injunction entered on August 2, 1976 may not be retroactively applied by the State to the period commencing January 1, 1976 but may be applied only from the date on which they were approved by HEW.

Accordingly, the defendants are directed to comply with the order of August 2, 1976 as modified by the order of October 15th.

It is so ordered.

Dated: New York, New York
November 5, 1976.

MORRIS E. LASKER
U.S.D.J.

11/9/76 GP

FOOTNOTE

1. The State submitted two of the three proposed changes in a single "transmittal" to HEW. These two proposed regulations, 10 N.Y.C.R.R. §§86.21(k) and 86.14(b) were both approved by HEW on August 16, 1976. A third amendment (§82.26) was separately submitted by the State to HEW, and was approved by HEW on October 4, 1976. Although at the time of the Court of Appeals remand only two of the three regulations which were the subject of the preliminary injunction had been approved, now that all three of them have been approved we consider the retroactivity of all of them since all relate to the method of reimbursement for inpatient services and are governed by 42 U.S.C. §1396a(a)(13)(D) which requires prior approval by HEW.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk.
BY [signature] Deputy Clerk

NOV 15 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,

Defendants.
----------X

76 Civ. 2027
#45348
CORRECTING
MEMORANDUM

LASKER, D.J.

In the Opinion in this case filed November 9, 1976, the first line on Page 1 is amended to read as follows: "On appeal from the grant of an injunc-".

In addition, the last line of Page 1 is amended to read as follows: "require that these kinds of changes -- that is, those".

In addition, the fourth line of Page 4 is amended to read as follows: "subject of the judgment entered on August".

Dated: New York, New York
November 11, 1976.

MORRIS E. LASKER
U.S.D.J.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____
Deputy Clerk

7/19/76 aff

ENDORSEMENT

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al., Plaintiffs, v. PHILIP L. TOIA, et al., Defendants. 76 Civ. 2027

LASKER, D.J.

The application for a protective order staying discovery, etc., is denied.

The application is predicated on the assumption that a motion for summary judgment which the State defendants, (and perhaps the federal defendants) intend to file forthwith, will eliminate the need for further discovery. While it is true that the change of focus of the case from the propriety of the actions of the State defendants to (at least in the first instance) the federal defendants' compliance with the requirements of the Administrative Procedure Act may possibly narrow the issues substantially, it is by no means clear at this moment that residual factual questions will not remain to be determined at trial. Considering the importance of the question to all the parties and the public, and the unfortunate aura of delay by the State defendants which has colored the case (including the failure to abide by the court's order to make payments to the plaintiffs) it would be inappropriate to stay plaintiffs' discovery.

There remains for determination the informal application of the State for postponement of the date of the commencement of trial. The appropriateness of such a postponement cannot be determined at this time. The decision will depend on the extent of discovery which is required and other relevant matters of trial preparation, including the special problems of change of attorney defending the case for the State defendants.

The motion for a stay of plaintiffs' discovery is denied. The informal application of the State for delay of the commencement of trial is denied without prejudice to renewal on a clear showing of the necessity for such an extension. Any decision relating to the time of trial will be influenced by the good faith or lack of good faith of the parties in proceeding to prepare for trial.

It is so ordered.

Dated: New York, New York
November 16, 1976.

ROBERT L. LASKER

U.S.D.J.

Filed
USDC of SDNY
11-17-76

Microfilmed
11-17-76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

/3

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL and THE MOUNT SINAI HOSPITAL, on behalf of themselves and all other nonprofit hospitals which are members of the Hospital Association OF NEW YORK STATE, INC. and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs,

- against -

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York, and DAVID MATTHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendants.

NOTICE OF APPEAL

76 Civ. 2037 (L.L.)

S I R S:

PLEASE TAKE NOTICE that the state defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order of the United States District Court, Southern District of New York (Lasker, D.J.) dated November 5, 1976 entered on November 9, 1976 in the office of the Clerk, United States District Court for the Southern District of New York denying retroactive application by the State of three new state regulations, 10 NYCRR §§ 86.21(b), 86.14(b) and 86.20 from the dates of their approval by the U.S. Department of Health, Education and Welfare to the period commencing January 1, 1976.

Dated: New York, New York
November 19, 1976

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